Supreme Court, U.S.
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No._____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, SUCCESSOR-BY-MERGER TO SECURITY PACIFIC NATIONAL BANK, AS TRUSTEE,
Petitioner,

VS.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR SANTA BARBARA SAVINGS AND LOAN ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in disregarding the express language of a federal regulation to achieve its desired result of bolstering the federal deposit insurance fund.

2. Whether a receiver may relieve itself of the burdens of an executory contract by repudiation, and thereafter selectively enforce rights of the receiver under the contract.

3. Whether a receiver's repudiation of the entirety of an indenture agreement repudiates the provisions of the indenture agreement under which the holders of the debt agreed their claims would be subordinated to senior debt.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were petitioner Bank of America National Trust and Savings Association, successor-by-merger to Security Pacific National Bank, as Trustee under an indenture for certain publicly traded debentures issued by Santa Barbara Savings and Loan Association and its parent, Financial Corporation of Santa Barbara, and respondent the Resolution Trust Corporation, as receiver for Santa Barbara Savings and Loan Association.

The parent company of petitioner is BankAmerica Corporation.

Nonwholly owned subsidiaries of petitioner are:

693327 Ontario Limited
MECA Software, L.L.C.
BankAmerica Gestion SGIIC, S.A.
Inchroy Credit Corporation Limited
Debt Recovery (Hong Kong) Limited
Phaestos FSC, Inc.
Tiryns FSC, Inc.
Film Asset Holding Co
Asian American Merchant Bank Ltd.
BA Lepanto Condominium Corp.
BA Savings Bank
Bankers Insurance Company, Ltd.
Hong Kong & Shanghai Insurance Co. Ltd.
Inversiones Aledo, C.A.
KorAm Bank

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Bank of America National Trust and Savings Association, successor-by-merger to Security Pacific National Bank, as Trustee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 63 F.3d 900 (9th Cir. 1995), *sub nom. Security Pacific National Bank* v. *Resolution Trust Corporation,* and is reprinted in the Appendix ("App.") at A-1. The order and judgment of the United States District Court for the Central District of California is unreported, and they, together with the transcript of the summary judgment proceeding, are reprinted at App. A-12 and A-15, respectively.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on August 22, 1995. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

The statute involved, 12 U.S.C. § 1821(e), provides in pertinent part:

> (e) Provisions relating to contracts entered into before appointment of conservator or receiver
>
> (1) Authority to repudiate contracts
>
> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease —
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's

> or receiver's discretion, will promote the orderly administration of the institution's affairs.
>
> * * *

The federal regulation involved, 12 C.F.R. § 389.11 (1990), provides in pertinent part:[1]

> (a) Unsecured claims against an association or the receiver that are proved to the satisfaction of the receiver shall have priority in the following order:
>
> * * *
>
> (6) Claims for withdrawable accounts, including those of the Corporation as subrogee or transferee, and all other claims which have accrued and become unconditionally fixed on or before the date of default, except as provided in paragraphs (a)(1) through (a)(5) of this section. . . .
>
> * * *
>
> (9) Claims that have been subordinated in whole or in part to general creditor claims, which shall be given the priority specified in the written instruments that evidence such claims; and
>
> * * *
>
> (c) If the rejection or repudiation of an unexpired lease or executory contract by the receiver gives rise to a claim for damages, such claims, if allowed, shall be classified as a claim that has accrued and become unconditionally fixed on or before the date of default, and not as an administrative expense of the receiver.
>
> * * *

---

[1] The full text of 12 C.F.R. § 389.11 (1990) is reprinted at App. A-50.

STATEMENT OF THE CASE

• *The Bonds at Issue*

On June 12, 1987, Santa Barbara Savings and Loan Association ("Santa Barbara Savings"), a state-chartered savings and loan association, issued $25,000,000 principal amount of 9% Convertible Subordinated Debentures ("debentures") due in 2012. Many of the debentures were subsequently converted to common stock, but $8,400,000 of the debentures were still outstanding when Santa Barbara Savings failed in the Spring of 1990.

The debentures were issued pursuant to an indenture under which Security Pacific National Bank was named as Trustee. (Security Pacific has since merged with Bank of America National Trust and Savings Association, but this change has no effect on the case and we will refer to the Trustee hereinafter as Security Pacific, as did the Ninth Circuit.) Pursuant to Article Four of the indenture each holder accepted and agreed to be bound by the provision that the indebtedness evidenced by the debentures would be subordinate to all Senior Indebtedness of Santa Barbara Savings, defined in the indenture to include the claims of depositors and general unsecured creditors.

• *History of the Regulations at Issue*

In 1985, the "hands-on" regulator of state-chartered savings and loan institutions was the Federal Savings and Loan Insurance Corporation ("FSLIC"), which was supervised by the Federal Home Loan Bank Board ("Bank Board"). The tiers of priority of claims against such an institution in receivership were governed, at that time, by 12 C.F.R. § 569a.7, promulgated by the Bank Board under the Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 294 (1968).

In November 1985, the Bank Board proposed a new regulation, § 569c.11, to replace § 569a.7. The proposed regulation set up new tiers for the priority of claims in all FSLIC receiverships. 50 Fed. Reg. 48970, 48995 (Nov. 27, 1985). On July 5, 1988, the Bank Board formally adopted a slightly modified version of these

priority provisions. 53 Fed. Reg. 25129, 25133 (July 5, 1988). The new regulation became effective on August 4, 1988, and was codified at 12 C.F.R. § 569c.11 (later renumbered 12 C.F.R. § 389.11). Subsection (a) of § 569c.11 provided:

> (a) Unsecured claims against an association or the receiver that are proved to the satisfaction of the receiver shall have priority in the following order:
>
> (1) [Administrative expenses incurred by the receiver];
>
> (2) [Administrative expenses incurred by the association (here, Santa Barbara Savings) in the 30 days prior to the receiver's taking possession];
>
> (3) [Claims for certain wages and salaries earned prior to the appointment of the receiver];
>
> (4) [Claims for certain other wages and salaries earned prior to the appointment of the receiver];
>
> (5) [Claims of governmental units for taxes, other than Federal income taxes];
>
> (6) "Claims for withdrawable accounts, including those of the Corporation [i.e., the receiver] as subrogee or transferee, and all other claims which have accrued and become unconditionally fixed on or before the date of default, whether liquidated or unliquidated, except as provided in paragraphs (a)(1) through (a)(5) of this section . . .";
>
> (7) "Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims under (a)(6) of this section . . .";
>
> (8) [Federal income taxes];
>
> (9) "Claims that have been subordinated in whole or in part to general creditor claims, which shall be given

> the priority specified in the written instruments that evidence such claims"; and
>
> (10) [Claims by holders of nonwithdrawable accounts, including stock].

Section 569c.11 also included a subparagraph (c) which had no prior counterpart in the regulations:

> (c) If the rejection or repudiation of an unexpired lease or executory contract by the receiver gives rise to a claim for damages, such claims [sic], if allowed, shall be classified as a claim that has accrued and become unconditionally fixed on or before the date of default, and not as an administrative expense of the receiver.

The Bank Board provided no explanation as to what the phrase "accrued and become unconditionally fixed on or before the date of default" meant. However, the language is identical to the defining language of tier (6), which pertains to depositor accounts and the claims of general creditors (*i.e.*, "All claims for withdrawable accounts ... and all other claims, whether liquidated or unliquidated, which have accrued and become unconditionally fixed on or before the date of default ...").

The Bank Board's comments in 1985 (50 Fed. Reg. at 48976, 48981), when it proposed subsection (c) in nearly identical form (*see* 50 Fed. Reg. at 48995), and its later comments at the time of enactment of the regulation in 1988, make it obvious that the unique and parallel language used in subsection (c) was intended as a cross-reference to tier (6), in which a tier (6) priority is set for "all other claims which have accrued and become unconditionally fixed on or before the date of default":

> Section 569c.11(c) makes it clear that *any* claim arising from the rejection or repudiation of an executory contract or an unexpired lease would constitute a *general unsecured claim* deemed to have arisen on or before the date of default.

53 Fed. Reg. at 25131 (July 5, 1988) (emphasis added).

On August 9, 1989, the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") was enacted. FIRREA replaced the FSLIC with the RTC, as the supervisor of state-chartered savings and loans. Section 401 of FIRREA provided that the regulations previously issued by FSLIC or the Bank Board, with regard to the conduct of receiverships, "shall continue in effect . . . until modified, terminated, set aside or superseded . . . by the Director of the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, or the Resolution Trust Corporation." [Pub. L. No. 101-73, 103 Stat. 354, 357].

In October 1989, the Federal Deposit Insurance Corporation ("FDIC") exercised direct dominion over § 569c.11 by transferring it, without change, from 12 C.F.R. ch. V to 12 C.F.R. ch. III and redesignating it as § 389.11. 54 Fed. Reg. 42799, 42800 (Oct. 18, 1989).

On August 22, 1990, the FDIC published in the Federal Register a notice of the proposed removal of certain regulations "relating to the conduct of conservatorships and receiverships . . . because they are redundant with other FDIC regulations, or conflict with statutory law, or are unnecessary." 55 Fed. Reg. 46495 (Nov. 5, 1990). On November 5, 1990, § 389.11 (formerly § 569c.11) was redesignated § 360.2[2] and was amended by the removal of subsection (c). 55 Fed. Reg. at 46496-97. Reasons for various other changes in the regulations were specified, but no reason was stated for the removal of subsection (c).

• *Receivership Proceedings at Issue*

On April 27, 1990, prior to the November 1990 amendment that removed § 389.11(c), the RTC was appointed conservator, and on May 10, 1990, receiver, of Santa Barbara Savings. On

[2] § 360.2 has since been redesignated § 360.3. 58 Fed. Reg. 67664 (Dec. 22, 1993).

June 15, 1990, the RTC informed Security Pacific, as Trustee, that the RTC, as receiver, had found "that the Indenture and Debentures issued thereunder are burdensome and that their repudiation will promote the orderly administration of the affairs of [Santa Barbara Savings]." App. A-54. The RTC thereupon repudiated the indenture and the debentures on the authority of 12 U.S.C. § 1821(e)(1). (No challenge is made to the RTC's power to repudiate as it did.) Security Pacific, as Trustee, filed its claim based on the repudiation on August 17, three days before the August 20, 1990, deadline set by the RTC. 12 C.F.R. § 389.11 was the regulation in force at the time the RTC repudiated the indenture and the debentures at issue in this case. It was also in full effect when Security Pacific filed its claim against the Santa Barbara Savings receivership.

The RTC did not determine whether to allow or disallow Security Pacific's claim within the statutorily required period of 180 days from August 17, 1990. *See* 12 U.S.C. § 1821(d)(5). On March 5, 1991, Security Pacific filed suit in the United States District Court for the Central District of California. Jurisdiction in the district court was based on 12 U.S.C. §§ 1441a(l)(1) and 1821(d)(6).

• *Lower Court Proceedings*

In its proof of claim and complaint in the district court, Security Pacific sought $8,736,000, an amount equal to the aggregate unpaid principal amount of the debentures, plus interest accrued as of May 10, 1990, the date of the RTC's appointment as receiver. Security Pacific also sought a determination that, because the RTC had repudiated its claim, subsection (c) of 12 C.F.R. § 389.11 (1990) required that the RTC classify the claim as a tier (6) priority claim. Security Pacific contended that because subsection (c) was in effect (i) at the time of the appointment of the RTC as conservator and receiver; (ii) at the time of the repudiation; and (iii) during the window of time when Security Pacific was able to file its proof of claim, subsection (c) was applicable. The RTC contended that subsection (c) was not applicable because 12 C.F.R. § 389.11 had been replaced in

November 1990 by 12 C.F.R. § 360.2, which does not include a subsection (c). The RTC further contended *inter alia* that, since subsection (c) was no longer in effect, Security Pacific's claim should be classified as a tier (9) claim because it involved debt that was, under the repudiated contract, subordinated.

Both Security Pacific and the RTC moved for summary judgment on stipulated facts. App. A-57. After a hearing, the district court granted Security Pacific's motion for summary judgment, and entered a declaratory judgment that Security Pacific's claim was entitled to tier (6) priority, a result compelled by the repudiation of the contract that included the subordination agreement and the plain language of subsection (c).

In reversing the district court, the Ninth Circuit did not reach the issue whether subsection (c) of 12 C.F.R. § 389.11 controlled. Instead, the court assumed, without deciding, that subsection (c) controlled (App. A-7), but nonetheless concluded that Security Pacific's claim was not entitled to tier (6) priority.

We respectfully submit that the opinion of the Ninth Circuit was result oriented. It ignores the clarity of the language of § 389.11 and permits the RTC to disregard its own regulation and its own affirmative act of repudiation simply to bolster the deposit insurance fund. The Ninth Circuit acknowledged that petitioner's argument that the claims fall in tier (6), is a "serious one. The language is indeed parallel, and the construction makes grammatical sense." However, the court went on to say that "It makes no practical sense, though. . . .", and then proceeded to ignore the plain language of the regulation and decide the issue based on "the purpose of regulatory capital" alone. App. A-7,10. The court thereupon cast Security Pacific's claim into tier (9), where it would have belonged if the RTC had not voluntarily repudiated the debentures and indenture.

REASONS FOR GRANTING THE PETITION

As the Ninth Circuit acknowledged, petitioner's argument for tier (6) treatment for repudiated debt is "a serious one."

App. A-7. This case offers the Court the opportunity (i) to reestablish the principle, undermined by the Ninth Circuit decision, that a federal agency must follow its own validly enacted regulations, (ii) to put aside the flawed assumption that the receiver must always win, and that whatever result furthers a statute's primary objective must be the law, and (iii) to settle the issue of first impression in this Court of whether a receiver may reap the benefits of repudiation without accepting the responsibilities imposed.

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH SEMINAL DECISIONS OF THIS COURT

In the past decade, the Bank Board and the FDIC have promulgated numerous regulations governing federal conservatorships and receiverships in response to the S&L crisis. However, the magnitude of the crisis does not justify attempts by thrift regulators to resolve the crisis in a manner that exceeds their regulatory authority, and this Court has properly and unhesitantly rejected overreaching conduct on the part of the thrift regulators. *E.g., O'Melveny & Meyers* v. *Federal Deposit Ins. Corp.*, ___ U.S. ___, 114 S.Ct. 2048 (1994) (rejecting receiver's attempt to create federal common law rule for state law tort liability); *Coit Indep. Joint Venture* v. *Federal Savings & Loan Ins. Corp.*, 489 U.S. 561 (1989) (unanimously rejecting regulators' attempt to require claimants to exhaust unauthorized administrative claims process before seeking judicial relief).

In this case, the overreaching conduct by the regulators has received a stamp of approval in direct contravention of this Court's holdings in *Service* v. *Dulles*, 354 U.S. 363 (1957) (Secretary of State must abide by state department regulations), *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (immigration officials may not act contrary to valid agency regulations) and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959) (Department of Interior must follow its own regulations for the

conduct of hearings into questions of internal security). By failing to give effect to the plain meaning of subsection (c), the Ninth Circuit has allowed the RTC to ignore its own validly enacted regulations, a result that threatens to undermine severely the orderly administration of federal conservatorships and receiverships.

The overreaching conduct by the RTC, as receiver in this case, is exacerbated by the fact that it has advanced a position that is directly contrary to the position it prevailed upon in another receivership. *See Resolution Trust Corp.* v. *Diamond*, 45 F.3d 665 (2d Cir.), *cert. denied*, ____ U.S. ____, 115 S.Ct. 2609 (1995). In *Diamond*, the RTC maintained that it had the authority to repudiate a failed thrift's rent-controlled leases. The Second Circuit ruled that the repudiation powers of the RTC under 12 U.S.C. § 1821(e) were not circumscribed by New York rent regulations. In so ruling, the Second Circuit noted that, although the landlord-tenant relationship in the lease was subject to state law restrictions, the tenancy itself was created by the lease. Consequently, the Second Circuit upheld the RTC's power to repudiate the leases, stating that

> Congress could not have intended [in 12 U.S.C. § 1821(e)] that the RTC would have the power only to disaffirm or repudiate a piece of paper, or certain sections of that document. Rather, Congress must have intended that the repudiation reach the relationships and interests that the document creates.

Diamond, 45 F.3d at 673. Similarly, in this case, although the indenture may have once imposed subordination rights and obligations between Santa Barbara Savings and Security Pacific, the subordination itself was created by Article Four of the indenture. Section 4.01 of the indenture, captioned "Agreement to Subordinate Securities," provides that Santa Barbara Savings (and its corporate parent) and the debenture holders covenant and agree that the debentures shall be issued subject to the

subordination provisions of the indenture. Under the rule of *Diamond*, and the position taken by the RTC in that case, when the RTC as receiver in this case repudiated the indenture, it necessarily repudiated the subordination relationships that the indenture document created.

The Ninth Circuit's opinion fundamentally distorts the repudiation powers of a federal receiver, and potentially undermines an important, settled area of analogous law. The administrative history of § 389.11 shows that, in giving guidance to receivers, the thrift regulators expected them to look to parallel provisions of bankruptcy law: "In defining and applying the executory contract provision [12 C.F.R. § 569c.11(c), the predecessor of subsection (c)], the receiver should seek guidance from analogous court decisions under 11 U.S.C. 365." 50 Fed. Reg. at 48976 (Nov. 27, 1985). A well-established body of bankruptcy jurisprudence interpreting the repudiation of executory contracts consistently disallows cherry-picking, and holds that the entire contract must be assumed or repudiated. *See, e.g., NLRB* v. *Bildisco (In re Bildisco & Bildisco)*, 465 U.S. 513, 531-32 (1984) (chapter 11 debtor in possession must assume executory contract *cum onere*); *In re Italian Cook Oil Corp.*, 190 F.2d 994, 997 (3d Cir. 1951) (trustee may not "blow 'hot and cold' "; he must either reject or assume the contract in full); *In re Audra-John Corp.*, 140 B.R. 752, 757 (Bankr. D. Minn. 1992) ("An executory contract is rejected *in its entirety*") (court's emphasis).

Nothing in the regulations or FIRREA indicates that the RTC's repudiation powers are any different, and *Diamond* supports the conclusion that they are not. Nonetheless, without citation to any authority, the Ninth Circuit summarily rejected the analysis universally employed in bankruptcy law and chose instead to fashion its own rule based on "policy" reasons, specifically, "the protection of . . . the insurer of the accounts of the insured institution," quoting 53 Fed. Reg. at 51,801 (Dec. 23, 1988). App. A-10.

The Ninth Circuit's conclusion is fundamentally flawed for several reasons. First, as this Court stated in *Rodriguez* v. *United States*, 480 U.S. 522 (1987),

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Id. at 525-26 (court's emphasis). The Ninth Circuit's foray into "policy" considerations, which was necessary to achieve the court's holding that the deposit insurance fund must always win, was totally unwarranted and directly in conflict with *Rodriguez*, which stated

> Where . . . "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.' "

Rodriguez, 480 U.S. at 526, citing *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980), quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214, n. 33(1976).

Second, the Ninth Circuit went even further astray by ascribing to its chosen "policy" consideration precedential weight that the consideration simply does not possess. As this Court recently stated in *O'Melveny*,

> [N]either FIRREA nor the prior law sets forth any anticipated level for the [deposit insurance] fund, so what [the receiver] must mean by "depletion" is simply the forgoing of *any* money, which, under any *conceivable* legal rules, might accrue to the fund. . . . Of course, we have no authority to do that, because there is no

> federal policy that the fund should always win. Our cases have previously rejected "more money" arguments remarkably similar to the one made here.

O'Melveny, 114 S.Ct. at 2055 (court's emphasis), citing *United States* v. *Kimbell Foods, Inc.,* 440 U.S. 715, 737-38 (1979); *United States* v. *Yazell,* 382 U.S. 341, 348 (1966).[3]

In support of its position in this case, the RTC was forced to rely upon a line of "estoppel" cases which began with the decision, *In re Weis Securities, Inc.,* 605 F.2d 590 (2d Cir. 1978), *cert. denied sub nom. Grossman* v. *Redington,* 439 U.S. 1128 (1979), and which includes *Northwest Racquet Swim & Health Clubs, Inc.* v. *Resolution Trust Corp.,* 927 F.2d 355, 359-60 (8th Cir.), *cert. denied,* 502 U.S. 815 (1991); and *In re Holiday Mart, Inc.,* 715 F.2d 430, 433 (9th Cir. 1983) (*per curiam*). In *Weis,* the court prohibited subordinated creditors of an insolvent securities broker from *rescinding* their subordination agreement on grounds of alleged fraud. In *Weis'* progeny, the courts likewise rejected attempts *by creditors* to *rescind* their subordinated investments after the financial institutions became insolvent. The *Weis* line of cases is not controlling here, as the Ninth Circuit recognized (App. A-8), because in this case it was not Security Pacific or the debenture holders who sought to "rescind." Instead, it was the RTC that chose to repudiate because the RTC had concluded that the debentures were "burdensome" and that repudiation would promote the "orderly administration of the affairs of [Santa Barbara Savings]." App. A-55. Likewise, the thrift regulators drafted subsection (c), and knew what it said when they elected to repudiate. Consequently, the regulatory interest of protecting the RTC, which motivated the courts in *Weis* and its

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[3] The Ninth Circuit's policy considerations were also unsupported by the lower court record. In fact, there was no evidence below as to whether funds in the receivership would not be sufficient to pay all tier (6) claims, including the subrogation claims of the federal deposit insurer, in full, if the debentures were classified at tier (6).

progeny, does not support the same result where it was the RTC itself that chose to repudiate the indenture.

The federal courts have consistently and properly held receivers to their own decisions with respect to assuming or repudiating executory contracts. In the case of *In re Frontier Properties, Inc.*, 979 F.2d 1358 (9th Cir. 1992), a bankruptcy trustee first assumed and then attempted to repudiate a land sale contract. The court bound the trustee to his election, even though this had the effect under the bankruptcy statutes of granting the resulting claim for breach a higher priority than claims of unsecured general creditors. As the Ninth Circuit wrote,

> When a trustee proves wrong in his gamble that the benefits of an assumed executory contract will outweigh the burdens, the [Bankruptcy] Code requires that unsecured creditors, not the contracting party, bear the risk of the loss.

Frontier Properties, 979 F.2d at 1367. *See Howerton* v. *Designer Homes by Georges, Inc.*, 950 F.2d 281 (5th Cir. 1992) (binding the RTC to its decision not to repudiate a contract, despite harsh consequences). The RTC must bear the risk of its own repudiation decision. If the RTC made a mistake, it is wrong for it to circumvent its own regulation in order to correct its mistake. And it was wrong for the Ninth Circuit to allow the RTC to do so by ignoring the language of the regulation for a result designed solely to suit the purpose of maximizing the deposit insurance fund.

The RTC is hardly a victim without a remedy. The RTC decided that it was in the best interest of the receivership to exercise its statutory power to repudiate the indenture, thereby relieving the receivership estate of the duties it was still to perform under the contract and the cost of assuming the contract, including paying 100% of overdue interest, *and* making future payments at contract rates from funds ultimately available to tier (9) creditors (or, on a more current basis, by issuing tier (9) receivership certificates). If the RTC wanted to avoid having

Security Pacific's claim prioritized at tier (6), it could have chosen not to repudiate the indenture and debentures. Instead, the RTC chose to diminish the size of Security Pacific's claim through its statutory repudiation power in order to relieve itself of the "burdens" of performance.[4] The RTC cannot enjoy the benefits of repudiation without accepting the burdens that accompany repudiation as well.

II.

THE NINTH CIRCUIT IGNORED THE PLAIN LANGUAGE OF THE REGULATION

The Ninth Circuit's failure to apply the plain language of the regulation is the very antithesis of what a court should do. "[A] statute or administrative rule may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." 2 Sutherland Stat. Construction § 31.06 at p. 545 (5th ed. 1993). The language of § 389.11(c) and the explanation of the regulation given by the Bank Board at the time of promulgation of that regulation are unambiguous — after repudiation, Security Pacific's claim fell in tier (6).

12 C.F.R. § 389.11 sets forth ten tiers of priority for claims against a receivership ranging from administrative expenses of the receiver (tier (1)), through general unsecured claims (tier (6)), subordinated debt (tier (9)), and finally to claims of stockholders (tier (10)). Subsection (c) of § 389.11 prioritizes claims on repudiated executory contracts and leases by the following language:

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[4] The fixing of the debt and interest obligations was not the only advantage the RTC received from its repudiation of the indenture. It was relieved of numerous other compliance burdens as well. For example, Section 7.04 of the indenture required the receiver to maintain Santa Barbara Savings' corporate existence; Section 7.09 required it to maintain Santa Barbara Savings' insured status; Section 7.14 required the receiver to provide certain statements of compliance with certain notice requirements; Section 12.01 required the receiver to maintain and furnish a list of debenture holders; and Section 12.03 required quarterly and annual reports to Security Pacific.

> (c) If the rejection or repudiation of an unexpired lease or executory contract by the receiver gives rise to a claim for damages, such claims, if allowed shall be classified as a claim that has *accrued and become unconditionally fixed on or before the date of default,* and not as an administrative expense of the receiver. (emphasis added)

The language underlined above is the same language used in the definition of tier (6):

> (6) Claims for withdrawable accounts, including those of the Corporation as subrogee or transferee, and all other claims which have *accrued and become unconditionally fixed on or before the date of default,* whether liquidated or unliquidated, except as provided in paragraphs (a)(1) through (a)(5) of this section ... (emphasis added)

Because the language is identical, this was not an accident or coincidence. Upon repudiation, subsection (c) placed Security Pacific's claim in the hierarchy of tiers described precisely by words that described tier (6), and not just in the place where the claim would have gone had there been no repudiation.

The RTC argued before the Ninth Circuit that the closing phrase of subsection (c), "and not as an administrative expense of the receiver," manifested the subsection's only purpose.[5] The

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[5] The RTC also argued below that the district court should have applied § 360.2, the regulation in effect at the time that the district court ruled, rather than § 389.11, the regulation in effect when the RTC repudiated the indenture and the regulation in effect when Security Pacific filed its claim. The district court properly ruled that § 389.11(c) was the regulation that governed. The Ninth Circuit did not reach the issue, ruling that even if § 389.11 controlled, the RTC was entitled to prevail.

If a change in the law subsequent to the accrual of a cause of action would negatively affect substantive rights, the change should only be applied prospectively. *Landgraf* v. *USI Film Products,* ___ U.S. ___, 114 S.Ct. 1483, 1499 (1994) ("the court must ask

RTC's construction might have merit if the regulation merely said that an unexpired lease or an executory contract which was repudiated was not, simply because of the repudiation, to go into the tier (1) category of the receiver's administrative expenses. But, in addition to saying where a repudiated executory contract is *not* to go, the regulation also says, quite affirmatively, where it *is* to go. It is to be classified as a claim that has "accrued and become unconditionally fixed on or before the date of the default." This is the language of tier (6). The Ninth Circuit simply concluded that all of the language in the regulation stating where the claim on a repudiated contract was to go was surplusage and meaningless, and that the claim would simply go wherever it would have gone had there been no repudiation. This interpretation violates one of the most fundamental precepts of statutory construction, by rendering half of subsection (c) meaningless. *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979) (It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.").

In addition to the parallel nature of the language of § 389.11(a)(6) and § 389.11(c), the Bank Board explanations of the regulation likewise compel the conclusion that Security Pacific's claim falls in tier (6). The Ninth Circuit claimed that the administrative history of § 389.11 is unhelpful. But while there is no prolix body of such history, when that subsection was first proposed in 1985, and again when it became effective in 1988 as

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whether the new provision attaches new legal consequences to events completed before its enactment"); *Bowen* v. *Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *Greene* v. *United States*, 376 U.S. 149 (1964) (denying retroactive application of change in regulation requiring discharged employee prove current entitlement to security clearance rather than entitlement at the time of discharge). Since all thrift creditors of a higher priority receive payment before any creditor of a lower priority, the substantive nature of the priority regulations is self-evident. The thrift regulators themselves referred to final rules affecting "priorities in liquidation" as "substantive issues." 53 Fed. Reg. at 25130 (July 5, 1988).

§ 569c.11(c), the Bank Board wrote that subsection (c) would make it clear that:

> *any* claim arising from the rejection or repudiation of an executory contract or a lease ["an unexpired lease" in the 1988 version] would constitute a *general unsecured claim* deemed to have arisen on or before the date of default. (emphasis added)

50 Fed. Reg. at 48976, 48981 (Nov. 27, 1985) and 53 Fed. Reg. at 25131 (July 5, 1988). The tier including matured general unsecured claims is tier (6) and no other tier. Far from being unhelpful, the only legislative history on the regulation squarely supports Security Pacific's interpretation.

Security Pacific's argument, the Ninth Circuit allows, "is a serious one . . . the language is indeed parallel, and the construction makes grammatical sense. It makes no practical sense, though . . . ." App. A-7.

> If we . . . treated subordinated debentures and "claims which have accrued and become unconditionally fixed" as widgets or meaningless verbal formulas, then we could go back and forth on the statutory construction problem without a clear resolution.

App. A-7. Thus, disregarding the plain terms of the regulations, the court then turned to "the purposes of the regulatory scheme" of subordinated debt, and tried to achieve a desired result by means of "ordinary canons of statutory construction." App. A-7. "Generally a more specific provision of an enactment prevails, in the sense of making an exception, to a more general provision." App. A-8. According to the court, Security Pacific's claim should therefore not go into tier (6), the level described in general terms, but into tier (9), the level described more specifically.

This method of analysis again simply ignored the directly pertinent regulation, and treated the claim as if there had been no repudiation. It also ignored the fact that a receiver must repudiate an entire contract, the good with the bad. On the one hand, the

RTC had fixed the receivership's maximum liability for the debentures and had rid itself of the responsibilities of management of the obligations placed upon it by the indentures. At the same time, the RTC wrongfully sought to preserve the debenture holders' agreement that their claims would be subordinated. *See Bildisco,* 465 U.S. at 531-32.

There can be no serious dispute that the indenture was a contract and was executory, and subject to being repudiated. *See In re Texaco, Inc.,* 73 B.R. 960, 964 (Bankr. S.D. N.Y. 1987); *IBJ Schroder Bank & Trust Company* v. *Resolution Trust Corp.,* 26 F.3d 370 (3d Cir. 1994). The RTC acknowledged as much when it chose to repudiate the indenture. But, while the Ninth Circuit acknowledged the cases that stand for the proposition that a receiver's repudiation of an executory contract repudiates all provisions of the contract, it simply refused to apply that principle in this case, stating simply "We do not see why that should be so in this context." App. A-10.

The court's rationale boiled down to "Why should a covenant from A to B and C drop out when C steps into A's shoes and repudiates A's debt to D." App. A-10. But this rationale again ignores the fact that, from the outset, C (the RTC) had the statutory right to repudiate in case of default, and when it did, that eliminated A's subordination covenant to C and B both under 12 U.S.C. § 1821(e) and under California law.[6]

The Ninth Circuit postulates that if Security Pacific's interpretation of subsection (c) were to be accepted, *i.e.*, that repudiated claims went to tier (6), it would "render the more specific provisions of levels eight [income tax], nine [subordinated debt], and ten [claims of non-withdrawable accounts and stock] meaningless." App. A-9. But that argument is falsely contrived. The

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[6] California Civil Code, Section 1559 (West 1982). "Enforcement by third party beneficiary. WHEN CONTRACT FOR BENEFIT OF A THIRD PERSON MAY BE ENFORCED. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

indenture is an executory contract, subject to being repudiated. *See Texaco, supra.* Neither income taxes, non-withdrawable accounts nor stock are executory contracts subject to repudiation under 12 U.S.C. § 1821(e). Thus, they are not subject by reason of repudiation to reclassification as to priority pursuant to the provisions of 12 C.F.R. § 389.11(c). Furthermore, subordinated (tier (9)) executory obligations do not have to be repudiated, and, if assumed, can be treated and paid at tier (9), through cash (in a surplus case) or through receivership certificates (in an insolvent receivership).

Finally, after refusing to apply accepted principles of statutory interpretation, the Ninth Circuit shifted to a bald exercise in judicial activism to reach the outcome it desired:

> It would make no sense to treat repudiation of the failed S&L's debt as though it nullified a subordination agreement designed to protect the government and the depositors in that precise eventuality.

and:

> The most persuasive argument by the RTC, the one which persuades us that its construction is correct, is that the purpose of subordination and the purpose of repudiation would be defeated if the debenture holders were jumped up to level six priority.

App. A-10.

Abandoning any further attempt to interpret the regulation on its terms, the court then held:

> The regulation is not just an arbitrary set of words, in which we plug and unplug dictionary definitions and identically worded subsections. It is a law designed to accomplish a purpose .... This purpose requires that level nine control the priority of the debentures, and that subsection (c) not be read as jumping repudiated subordinated debentures up to level six.

App. A-11.

We respectfully submit that the opinion of the Ninth Circuit was not based on any logical interpretation of the meaning of § 389.11, but was simply a result-oriented, policy driven foray into furthering the court's perception of the "purpose of regulatory capital," in direct contravention of this Court's holding in *Rodriguez*.

III.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH SETTLED PRINCIPLES OF REPUDIATION LAW AND WITH THE SECOND CIRCUIT'S HOLDING IN *DIAMOND*

Even ignoring § 389.11(c), a claim on a subordinated debenture that has been repudiated is entitled to tier (6) priority. In light of the principles set forth above, to the effect that repudiation of an executory contract repudiates each and every term of that contract, the repudiation by a receiver of a subordinated debenture and its indenture effects a repudiation of all of the receiver's rights under the indenture, including the right to enforce an agreement to subordinate. If the agreement to subordinate no longer applies, the debenture claim becomes a general unsecured, matured claim for liquidated damages in a sum certain, and belongs in tier (6). And this is so even without the benefit of a regulation such as § 389.11(c).

Therefore, the issue in this petition is not merely whether § 389.11(c) was applicable, or whether its terms should have been construed, as the district court did, to classify Security Pacific's claim in tier (6). Rather, repudiation of the subordination provision of the indenture, along with its other provisions, resulted in a claim that fell automatically in tier (6) — a matured unsecured claim for a sum certain. Under the state of the law prior to the Ninth Circuit's decision, both statutory and regulatory, and even ignoring the effect of § 389.11(c), a subordinated

debenture could not be repudiated by a receiver without raising the level of priority of a claim made on the basis of repudiation from tier (9) to tier (6).

This is a case of first impression in this Court and will establish the appropriate principle for every case in which the RTC or FDIC must decide whether to repudiate a subordinated debenture. The Ninth Circuit's decision would operate to change settled law, with or without application of § 389.11(c). This case will also determine whether the FDIC should seek to amend its regulations to try to remedy any resulting problem, or whether statutory relief is required. There are already two cases pending that involve this issue, [7] and more may be anticipated, since subordinated debt is not an unusual means of financing financial institutions.

The decision of the Ninth Circuit allowing the RTC to "cherry-pick" and preserve those provisions of a repudiated contract it wishes to retain is in conflict with the decision of the Second Circuit in *Diamond*, 45 F.3d at 673. The Second Circuit, in *Diamond*, held that repudiation abrogates all of the provisions of the repudiated contract. Without guidance from this Court as to the full effect of repudiation of an executory contract, an irreconcilable conflict in the circuits will exist, and courts will be left in a quandary as to which of the two rules to follow.[8]

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[7] The subsection (c) issue was present in a different appeal, *Bank of America Trust & Savings Ass'n v. Resolution Trust Corporation*, No. 93-56566 (9th Cir.), which involved a different receivership, and which has been dismissed without prejudice to reinstatement subject to the outcome of this petition. The issue is also present in *Anthony B. Walsh, et al. v. The Resolution Trust Corporation, etc.*, USDC No. 93-3157-IH (C.D. Cal.), where the district court is awaiting the outcome of this case before rendering its decision.

[8] By direct analogy, the Ninth Circuit's decision is also in conflict with the holdings of this Court, in *Bildisco*, 465 U.S. at 531-32, and the Third Circuit's decision in *Italian Cook Oil*, 190 F.2d at 497, that bankruptcy receivers must assume or reject executory contracts *in toto*.

IV.

THIS PETITION RAISES IMPORTANT ISSUES

There are at least two other pending cases now, and more likely to follow, in which a ruling on this petition will control. While subsection (c) has been withdrawn, and issues under that precise subsection are unlikely to reoccur, that does not militate against granting the writ. As stated above, issues regarding the effect of repudiation and cherry-picking by receivers are likely to recur.

Further, this Court has in the past stood ready to grant certiorari where principles of statutory or regulatory construction transcend the importance of the provisions being construed — or, as in this case, where correct principles are simply ignored in the name of "purpose." For instance, certiorari was granted in *Rodriguez*, where it was known in advance that one of the two statutes at issue would soon thereafter be substantially altered, and the other would be repealed. This Court nonetheless granted certiorari because, as here, the court of appeals' judgment was "plainly inconsistent with important doctrines of statutory construction." *Rodriguez*, 480 U.S. at 526.

Aside from upsetting settled principles of statutory construction and repudiation law, the Ninth Circuit's decision is plainly inconsistent with principles of federal court and agency self-restraint set forth in this Court's decisions in *Rodriguez, Service, Accardi, Vitarelli, Coit* and *O'Melveny*. This Court should grant a writ of certiorari to correct the clear error of the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

FOR PUBLICATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

SECURITY PACIFIC NATIONAL BANK, as Trustee,

Plaintiff-Appellee,

v.

THE RESOLUTION TRUST CORPORATION, as Receiver of Santa Barbara Federal Savings and Loan Association,

Defendant-Appellant.

No. 92-55965
D.C. No.
CV-91-1198-IH

OPINION

Appeal from the United States District Court
for the Central District of California
Irving Hill, District Judge, Presiding

Argued and Submitted
February 4, 1994 — Pasadena, California

Decided August 22, 1995

Before: James R. Browning, Robert R. Beezer*
and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Circuit Judge Kleinfeld

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* The Honorable Harold M. Fong, United States District Judge for the District of Hawaii, participated in oral argument. Judge Fong died on April 20, 1995. Pursuant to Ninth Circuit General Order 9.2.g, The Honorable Robert R. Beezer was drawn to replace Judge Fong on the panel. Judge Beezer has read the briefs, reviewed the excerpts of record and listened to a recording of oral argument held on February, 4, 1994.

The issue is priority of subordinated debenture holders after a bank failure. When a bank fails, and the Resolution Trust Corporation (RTC) repudiates the bank's subordinated deben-

tures, do subordinated debenture holders get the same priority as holders of other debt? No. Their interest remains subordinated.

I. Facts.

No facts were disputed. The district court granted summary judgment in favor of the holders of the subordinated debentures. We reverse, and remand for entry of summary judgment in favor of the RTC.

Debentures are ordinarily unsecured obligations of a corporation. They typically differ from promissory notes, in that they are issued pursuant to a trust indenture. The trustee acts as an agent for the debenture holders, to supervise the debtor's compliance with its covenants in the debentures, and to collect the debt when due. The trust indenture scheme makes it practical to issue debentures for many millions of dollars, to many investors. The investors do not have to supervise compliance or collect the money when due, and the corporation does not have to deal with large numbers of investors. *See* Henry Winthrop Ballantine, Ballantine on Corporations 494-497 (rev. ed. 1946).

Subordination is a device by which lawyers enhance productive capacity through ideas and words. Ordinarily if a debtor borrows money, then its ability to borrow more money from others is reduced. Other things being equal, only so much debt can be piled on a debtor's back, and more would be unsound for both debtor and creditor. But if debt is subordinated, then it may enhance the creditworthiness of the debtor instead of reducing it. To the holder of the senior debt, the subordinated debt functions as capital, enhancing the productive capacity of the borrowing firm without encumbering its assets in competition with the senior creditor. The subordinated creditor may have an equity interest in the firm independent of the debenture, or may be getting a high yield on the debenture. If the company succeeds, the debenture holder gets the higher interest likely to have agreed upon as compensation for subordination, and if it fails, at least he gets his share ahead of the stockholders.

In 1987, Santa Barbara Savings and Loan Association issued $25 million of 9% Convertible Subordinated Debentures due in 2012.[1] Security Pacific National Bank[2] was the trustee on behalf of the debenture holders. The purpose of the offering was to increase Santa Barbara's "regulatory capital," that is, the minimum capital required by banking regulations. New federal regulations had increased the regulatory capital requirements for savings and loan institutions like Santa Barbara S & L. Regulatory capital requirements are intended to provide a cushion to absorb losses, to reduce the burden on federal deposit insurance funds, and to ensure that depositors can get their money back. Regulatory Capital Requirements for Insured Institutions, 53 Fed. Reg. 51,800 (Dec. 23, 1988); *Northwest Racquet Swim & Health Clubs, Inc.* v. *Resolution Trust Corporation*, 927 F.2d 355, 360 (8th Cir.), *cert. denied*, 502 U.S. 815, 112 S.Ct. 66, 116 L.Ed.2d 41 (1991).

The banking regulations allow institutions to use proceeds from the sale of subordinated debentures to meet regulatory capital requirements, provided that the debentures meet certain requirements. These requirements are intended to ensure that the subordinated debentures are really subordinated, like capital rather than ordinary debt, in order to protect creditors and depositors. After all, if the holders of subordinated debentures could share equally with the RTC and depositors the meat from the carcass of a failed bank, then the money loaned to the bank by the debenture holders would not enhance the security of the depositors and the government. The certificate evidencing the subordinated debt must "[c]learly state that the security ... is subordinated on liquidation, as to principal, interest, and premium, if any, to all claims (including post-default interest)

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[1] Most of the debentures were exchanged for common stock in 1990, but $8.4 million of the debentures remained outstanding when the bank failed.

[2] Security Pacific was taken over by Bank of America, but this change has no effect on the case. We refer to the appellee as Security Pacific for purposes of simplicity.

against the institution having the same priority as savings account holders or any higher priority." 12 C.F.R. § 563.81(d)(1)(ii). Santa Barbara's Subordinated Debentures met this requirement. The indenture provided:

> The indebtedness evidenced by the Securities shall be subordinate and junior in right of payment to all Senior Indebtedness in that in case of (a) any insolvency, receivership, conservatorship, reorganization, readjustment of debt, marshalling of assets and liabilities or similar proceedings or any liquidation relating to or winding up of the Association or the Holding Company, each as a whole, whether voluntary or involuntary or (b) the maturity of Senior Indebtedness by lapse of time, acceleration or otherwise (each a "*Specified Event*" and collectively the "*Specified Events*"), all such Senior Indebtedness shall be entitled to be paid in full before any payment shall be made on account of the principal of, premium, if any, or interest on the Securities.

The investors in the debentures subordinated their claims to those of the senior creditors, as they had to in order for the debentures to function as regulatory capital.

The Office of Thrift Supervision appointed the Resolution Trust Corporation as Conservator of Santa Barbara Savings and Loan in 1990 upon finding that Santa Barbara had insufficient capital. Shortly thereafter the RTC was appointed receiver, to liquidate the failed S & L.

The RTC repudiated the subordinated debentures. It has the power to repudiate under 12 U.S.C. § 1821(e)(1). Security Pacific filed a complaint in federal district court seeking damages for the RTC's repudiation, pursuant to 12 U.S.C. § 1821(e)(3). Neither the RTC's right to repudiate nor Security Pacific's right as trustee for the debenture holders to damages is at issue.

The sole issue on appeal is priority of the debenture holders claims relative to those of other creditors. Security Pacific sought a declaratory judgment that its claims were entitled to level six priority. That would allow the subordinated debenture holders to share on an equal footing with general creditors, including the RTC as subrogee of the failed S & L's depositors. The RTC argued that Security Pacific's claims were entitled to level nine priority. That would let the general creditors and the RTC fully satisfy their claims before any remaining money went to the debenture holders.

The parties agreed to a stipulated set of facts. Both sides moved for summary judgment. The district court granted summary judgment in favor of Security Pacific, holding that under 12 C.F.R. § 389.11 (1990), Security Pacific's claim was entitled to level six priority. The RTC appealed. We review *de novo*, *Kruso* v. *Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990), and we reverse, because we construe the regulation differently.

II. Analysis.

Here is the regulation we must construe:

> (a) Unsecured claims against an association or the receiver that are proved to the satisfaction of the receiver shall have priority in the following order:
>
> (1) Administrative expenses of the receiver . . .
>
> (2) Administrative expenses of the association . . .
>
> (3) Claims for wages and salaries . . .
>
> (4) [Certain additional] claims for wages and salaries . . .
>
> (5) Claims of governmental units for unpaid taxes, other than Federal income taxes . . .

(6) Claims for withdrawable accounts, including those of the Corporation as subrogee or transferee, and *all other claims which have accrued and become unconditionally fixed on or before the date of default*, whether liquidated or unliquidated, except as provided in paragraphs (a)(1) though (a)(5) of this section . . .

(7) Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims under paragraph (a)(6) of this section . . .

(8) Claims of the United States for unpaid Federal income taxes;

(9) *Claims that have been subordinated in whole or in part to general creditor claims, which shall be given the priority specified in the written instruments that evidence such claims* and;

(10) Claims by holders of non-withdrawable accounts, including stock . . .

(c) *If the* rejection or *repudiation of an* unexpired lease or *executory contract by the receiver gives rise to a claim for damages, such claims, if allowed, shall be classified as a claim that has accrued and become unconditionally fixed on or before the date of default, and not as an administrative expense of the receiver.*

12 C.F.R. § 389.11 (1990) (emphasis added).

The RTC argues that priority nine applies to subordinated debentures, not priority six. Security Pacific argues that subsection (c) operated, because of the repudiation, and that subsection (c) turns any repudiated claim into a priority six claim. The basis for Security Pacific's argument is that the language in subsection (c) for priority of repudiated claims, "shall be classified as a

claim that has accrued and become unconditionally fixed on or before the date of the default," exactly parallels the language in subsection (a)(6), "all other claims which have accrued and become unconditionally fixed on or before the date of default."

One issue which we do not reach is the RTC's argument that subsection (c) has no application, because it was deleted from the regulation before the district court decided the case. Security Pacific responds that subsection (c) was in effect at the time of the repudiation, so its rights vested then, and could not be taken away by a subsequent change in the law. We assume without deciding that subsection (c) controls. We conclude that the RTC, nevertheless, prevails on the priority issue.

Security Pacific's argument, that subsection (c) raises damages claims for repudiated debt to level six, is a serious one. The language is indeed parallel, and the construction makes grammatical sense. It makes no practical sense, though, and cannot be reconciled with a grammatical and literal construction of the rest of the regulation. If we did not consider the meaning and purpose of subordinated debentures, and instead treated subordinated debentures and "claims which have accrued and become unconditionally fixed" as widgets or meaningless verbal formulas, then we could go back and forth on the statutory construction problem without a clear resolution. But when we carefully apply ordinary canons of statutory construction, in light of the purposes of the regulatory scheme and the practical significance of the exercise, we must conclude that subordinated debt stays subordinated.

Generally subordinated debt stays subordinated to the claims of general creditors upon the insolvency of the institution where the subordinated debt served as regulatory capital. *See, e.g., In re Holiday Mart, Inc.*, 715 F.2d 430, 433 (9th Cir. 1983) (per curiam); *Northwest Racquet*, 927 F.2d at 363; *Central Nat'l Bank* v. *FDIC*, 910 F.2d 1279, 1280-81 (5th Cir. 1990); *In re Weis Securities, Inc.*, 605 F.2d 590, 596 (2d Cir. 1978), *cert. denied*, 439 U.S. 1128, 99 S.Ct. 1045, 59 L.Ed.2d 89 (1979). There would not be much point to subordination, or to allowing subordi-

nated debentures to be used as regulatory capital, if this were not so. As the Eighth Circuit noted, the protection afforded by regulatory capital "would be severely undermined if, at the time when the protection was most sorely needed, claims of general creditors or depositors were made contingent upon the lower priority claims of subordinated debt and equity interests." *Northwest Racquet*, 927 F.2d at 361.

These cases do not control, because they do not involve repudiation, and application of subsection (c). The question in this case is whether subsection (c) changes the priorities to the advantage of subordinated debt.

We cannot ignore subsection (c). If subsection (c) is not meant to elevate all repudiated debt to level six priority, what other function could it perform? We must avoid a construction which renders any language of the enactment superfluous. *In re Burns*, 974 F.2d 1064, 1066 (9th Cir. 1992). The RTC argues the last clause of subsection (c) manifests its purpose. That clause says "and not as an administrative expense of the receiver." Under this construction, subsection (c) would bar an argument that repudiated debt rose to level one priority, but would not elevate claims that are level seven through ten to level six. We need not decide whether subsection (c) is so narrowly confined. Even assuming that repudiated claims generally get level six priority under subsection (c), that would not be so where a more specific subsection, such as eight, nine, or ten, provides for a different priority. Generally a more specific provision of an enactment prevails, in the sense of making an exception to, a more general provision. *See* 2A Norman J. Singer, Sutherland Statutory Construction § 47.17 (5th ed. 1992) ("If the general words are given their full and natural meaning, they would include objects designated by the specific words, making the latter superfluous."). *See also International Ass'n of Machinists & Aerospace Workers v. The Boeing Co.*, 833 F.2d 165, 169 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014, 108 S.Ct. 1488, 99 L.Ed.2d 715

(1988); *Karrell* v. *U.S.*, 181 F.2d 981 (9th Cir. 1950), *cert. denied,* 340 U.S. 891, 71 S.Ct. 206, 95 L.Ed.646 (1950).

If we apply Security Pacific's interpretation of subsection (c) to the parallel language of subsection (a)(6), levels eight, nine, and ten are rendered superfluous. The reason is that it is implicit in Security Pacific's argument that if a claim falls within the language of level six and also a lower level, then level six must control. Such a construction must fail because all claims which do not fall within level six by logical necessity would fall within the equally general language of level seven, which encompasses "[c]laims other than those that have accrued and become unconditionally fixed on or before the date of default." 12 C.F.R. § 389.11(a)(7) (1990). Because all claims, including lower priority claims, necessarily accrue at some point — either on or before the date of default, or at some later time — Security Pacific's interpretation of subsection (c) would render the more specific provisions of levels eight, nine, and ten meaningless. We must avoid a construction which fails to give effect to every subsection of the enactment. *Burns*, 974 F.2d at 1066; 2A Sutherland Statutory Construction § 46.05. Suppose, hypothetically, there is a federal income tax claim, which the regulation designates as level eight. Either it accrued and becomes unconditionally fixed on or before the date of default, so it would have level six priority, or it did not, so it would have level seven priority. But that cannot be right, because level eight would then have no practical meaning.

Security Pacific maintains that the administrative history of 12 C.F.R. § 389.11 (1990) demonstrates that its interpretation is the correct one. Like so many trips through legislative history, we complete it with no more than we had when we started it. There is nothing to which the parties have directed our attention which speaks to the question at issue, just reformulations of the language in the regulation in the course of discussion of other issues. The administrative history does not address the applicability of 12 C.F.R. § 389.11 (1990) to claims based on subordinated debt.

Security Pacific tries to make sense of why repudiation would elevate its level nine claim to level six, by arguing that when RTC repudiated the debentures, it necessarily repudiated the subordination clauses of the debentures. Security Pacific cites *In re TransAmerican Natural Gas Corp.*, 79 B.R. 663 (Bankr. S.D. Tex. 1987), and *In re EI International,* 123 B.R. 64 (Bankr. D. Idaho 1991) for the proposition that a receiver's repudiation of an executory contract repudiates all provisions of the contract. We do not see why that should be so in this context. The debenture is a promise running from the failed bank to the investors. The subordination is a covenant running from the investors to depositors and the government. The subordination is intended to benefit the government and the depositors in the event that the S & L cannot pay all its debts. Why should a covenant from A to B and C drop out when C steps into A's shoes and repudiates A's debt to D? Subordination does not matter much if the S & L pays its debts. It matters a great deal if the S & L defaults on its obligations, and not enough money is left to pay all the creditors. It would make no sense to treat repudiation of the failed S & L's debt as though it nullified a subordination agreement designed to protect the government and the depositors in that precise eventuality.

The most persuasive argument by the RTC, the one which persuades us that its construction is correct, is that the purpose of subordination and the purpose of repudiation would be defeated if the debenture holders were jumped up to level six priority. If that were so, then the debentures would reduce the capital available for depositors and the government, instead of increasing it. They would not have performed the purpose of regulatory capital. Regulatory capital requirements exist to reduce this taxpayer burden. *See, e.g., Northwest Racquet*, 927 F.2d at 361; 53 Fed. Reg. at 51,801 (Dec. 23, 1988) ("the most important purpose [of regulatory capital] is protection of . . . the insurer of the accounts of the insured institution").

III. Conclusion.

The regulation is not just an arbitrary set of words, in which we plug and unplug dictionary definitions and identically worded subsections. It is a law designed to accomplish a purpose. We must examine the meaning of an enactment to see whether one construction makes more sense than another as a means of attributing a rational purpose to the enacting authority. *Longview Fibre Co.* v. *Rasmussen,* 980 F.2d 1307, 1311 (9th Cir. 1992). The purpose of subsection (a), designating the priority level nine for subordinated debt, together with the subordination clause in the debentures and the regulations controlling the use of these debt instruments as regulatory capital, was to enlarge the borrowing ability of the S & L by subordinating the debenture holders to the depositors and the government as their insurer. This purpose requires that level nine control the priority of the debentures, and that subsection (c) not be read as jumping repudiated subordinated debentures up to level six.

REVERSED.

APPENDIX B

[Entered July 6, 1992]

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

SECURITY PACIFIC NATIONAL BANK, as Trustee, *Plaintiff,* *v.* THE RESOLUTION TRUST CORPORATION, *et al.*, *Defendants.*	No. CV-91-1198-IH ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

There came before the Court for hearing on June 29, 1992, reciprocal mutual motions for summary judgment on the part of plaintiff and defendant, The Resolution Trust Corporation ("RTC"). The same were made, based upon and pursuant to, a stipulation of facts filed January 27, 1982. Both motions for summary judgment were filed March 23, 1992.

Appearances were: For plaintiff, Sheppard, Mullin, Richter & Hampton by Charles H. MacNab, Jr., Esq. and Robert S. Gerber, Esq.; and for defendant, Tarkington, O'Connor & O'Neill by Albert Tumpson, Esq. and Kenderton S. Lynch, Esq.

A Stipulation and Order filed June 29, 1992 has substituted "Bank of America National Trust and Savings Association, as Trustee" as plaintiff in this case.

At the outset of the hearing, counsel for both sides agreed that the matter was ripe for decision on the merits at this time. They agreed that there were no bona fide disputes of material fact which would inhibit or prevent any such decision.

The Court, having considered the said motions, together with the evidence, points and authorities and other documents filed in

support thereof and in opposition thereto, and having heard argument, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendant's motion for summary judgment is denied. Defendant has not shown entitlement thereto as a matter of law.

2. Plaintiff's motion for summary judgment is granted as to both the first and third causes of action. Plaintiff has shown entitlement as a matter of law to summary judgment on each said cause of action.

3. As to plaintiff's first cause of action, plaintiff shall have judgment against defendant The Resolution Trust Corporation. The Court orders that plaintiff's claim in the amount of eight million seven hundred thirty six thousand dollars ($8,736,000.00) is allowed in its entire amount and that the claim in its entire amount shall be treated as allowed by defendant The Resolution Trust Corporation in the Santa Barbara Savings and Loan Association receivership.

4. As to plaintiff's third cause of action, plaintiff shall have judgment against defendant The Resolution Trust Corporation. The Court orders that plaintiff's claim as described in the preceding paragraph shall, in its entire amount, be given a priority equal to claims for withdrawable accounts, including those of the RTC as subrogee or transferee, and all other claims of equal priority which have accrued and become unconditionally fixed on or before the date of default, said priority also being known as Level or Priority Six (6).

5. A transcript of the proceedings in open court on June 29, 1992, is ordered filed when produced. It is incorporated herein by reference. The transcript shall constitute the Court's further findings of fact and conclusions of law as well as a statement of the Court's reasons.

6. The Clerk shall transmit a copy of this order and judgment by U.S. mail to all counsel of record.

DATED: July 2, 1992.

/s/

IRVING HILL, Judge
United States District Court

APPENDIX C

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, Senior United States District Court Judge

SECURITY PACIFIC NATIONAL BANK, as Trustee,

Plaintiff.

vs.

THE RESOLUTION TRUST CORPORATION, *et al.*,

Defendants.

CASE NO. CV 91-1198-IH

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, June 29, 1992

1:30 p.m.

MUTUAL MOTIONS MOTIONS FOR SUMMARY JUDGMENT

John G. Turman
Official Court Reporter
404 United States District Court
312 North Spring Street
Los Angeles, California 90012
(213) 894-3507

APPEARANCES

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Hearing re: Mutual Motions for Summary Judgment

PROCEEDINGS

THE COURT: All right. Mr. Clerk, we have only the one matter on the calendar today; perhaps you will call it.

THE CLERK: Item No. 7: CV 91-1198-IH, Security Pacific National Bank versus The Resolution Trust Corporation.

Counsel, announce your appearances, please.

THE COURT: Let plaintiff first, I guess.

MR. MacNAB: Good afternoon, Your Honor. Charles McNab, Robert S. Gerber from Sheppard, Mullin, Richter & Hampton, pursuant to the recently filed stipulation of Bank of America National Trust and Savings as Trustee.

THE COURT: It's the plaintiff anyway and we are not going to change caption of the case. We really can't, so it will still be referred to as Security Pacific, but everybody knows that the real-party-in-interest as plaintiff is the B of A presently. You will handle it, Mr. McNab, I take it?

MR. MacNAB: I will, Your Honor.

THE COURT: Okay. And for defendant?

MR. TUMPSON: Your Honor, Albert Tumpson and Kenneth Lynch — I'm sorry — Kenderton Lynch for the defendant Resolution Trust Corporation in its capacity as receiver for Santa Barbara Savings.

THE COURT: You will be handling it?

MR. TUMPSON: Yes, Your Honor.

THE COURT: All right. Have seats, counsel.

The court has before it today reciprocal mutual motions for summary judgment. As outlined at a previous conference in court and on the record, both sides agreed that the case is ripe for decision, final decision today, based on stipulated facts that have been filed. That's correct, is it not?

MR. MacNAB: That is correct from the plaintiff's perspective.

MR. TUMPSON: And from the defendant.

THE COURT: All right. Thank you.

The complaint, after certain causes of action and parties were dismissed, consists of two causes of action. Cause of Action 1 seeks an order allowing the trustees, and the trustees are the plaintiff, the trustees claim which order would not specify the priority afforded the claim. And on this cause of action so delineated there is no contest. Defendant agrees that plaintiff's motion for such an order allowing the claim may be granted. Correct?

MR. TUMPSON: Your Honor, as stated in our papers, it's our position that a claim without the priority is meaningless.

THE COURT: Well, but —

MR. TUMPSON: We would stipulate — we would accede to the amount of the claim.

THE COURT: I regard the papers of the government as not contesting that plaintiff is entitled to allowance of the claim. I think that's a fair reading of your papers. The real issue is priority and that is stated in your own opposition at page 3, line 4.

MR. TUMPSON: Yes, Your Honor, but the original claim that was stated was a claim for a certain amount of money at priority six. And we could — and we do not stipulate —

THE COURT: Well, hold on. There may be a misunderstanding, maybe on my part, maybe on yours, of what the first cause of action is about. I haven't yet discussed the other remaining causes of action. Let's see what the plaintiff thinks the first cause of action is and what is sought under it, if you looked at it alone.

MR. MacNAB: The plaintiff's first cause of action seeks an order of this court that its claim and Santa Barbara receivership in the amount of $8,736,000 be allowed without reference to priority.

THE COURT: Without any preference to priority?

MR. MacNAB: Absolutely.

THE COURT: That's what I thought. Now, knowing that, and I speak to the defense, you oppose it or not?

MR. TUMPSON: Your Honor, this litigation is based upon —

THE COURT: Well, maybe you didn't hear my question. I'll say it again. Plaintiff has just stated the parameters and the objective of the first cause of action just as I thought that they were, namely, for an order allowing the claim without reference to any priority. Now, on that basis do you or do you not object to such an order?

MR. TUMPSON: We do.

THE COURT: On what basis and where is it in your papers? First, on what basis?

MR. TUMPSON: On the basis that for the receiver to allow a claim without reference to priority is meaningless and therefore that the cause of action is seeking something firstly that is meaningless —

THE COURT: Where is that in your papers?

MR. TUMPSON: I think we have stated it in our papers.

THE COURT: Show me, please. I have or will have in a minute your opposition and your motion of the — let's see, your papers consist of your motion and your reply to the opposition to your motion, and they also consist, do they not, of an opposition to the plaintiff's motion, so you have two sets of papers. Right?

MR. TUMPSON: Yes, we do.

THE COURT: Where is this that you are talking about?

MR. TUMPSON: I will have to search for it, Your Honor, in my papers.

THE COURT: I don't think it's worth much effort because —

MR. TUMPSON: All right.

THE COURT: — because I am not inclined to agree. Although I want to hear from plaintiff that the first cause of action should — motion for judgment should be denied because it's meaningless, I do not regard it as meaningless within the statutory and regulatory scheme.

MR. TUMPSON: We have said in this court and in our papers that we would be willing to grant the first cause of action as a subordinated debt.

THE COURT: Well, you are prepared to give it a nine priority, aren't you?

MR. TUMPSON: Yes.

THE COURT: That's allowed, isn't it?

MR. TUMPSON: Well, if we allow it a nine priority, Your Honor, we have no objection.

THE COURT: Well, the plaintiff has stated the causes of — the parameters of the first cause of action which seeks an order allowing the plaintiff's claim without reference to priority. In my opinion, that is not opposed in the defense papers. If the defendant's papers are construed as opposing it, my tentative view is to grant the plaintiff's motion, there being no bona fide dispute of material fact and this plaintiff having shown entitlement to that kind of an order as a matter of law.

Let's proceed to the far more important issue. By the way, again, I'm speaking to defense counsel. Excuse me a moment. You saw Mr. Tumpson's, the plaintiffs, proposed judgment on the first cause of action. It's just what plaintiff's have said. Is the form of judgment satisfactory or do you want to argue about it? You have the right, of course, to object to it being granted.

MR. TUMPSON: If the court will give me a minute.

(Pause)

THE COURT: I am now not asking you to agree to it but whether you have any objections to the form of it.

MR. TUMPSON: Your Honor, the judgment does not make any distinction between allowing the claim without reference to priority.

THE COURT: I think it does. Let's have a look.

MR. TUMPSON: Paragraph one.

THE COURT: Hold on, please, sir. Let's proceed. I think it's more important to get to the battleground. I will look again at this proposed judgment on the first cause of action during recess.

Now, I want to abstract the remaining cause of action which is Cause of Action 3. That one is the battleground. And in it plaintiff seeks a judgment, an order giving to the claim, the claim which the court has already allowed, a priority six under the system of priorities set forth in the regulation. The regulation was formerly found at 12 C.F.R. Section 389.11 and priority six is covered in paragraph (a)(6), small A in parenthesis and the Arabic six in parenthesis, of 389.11. It is my tentative view, counsel, that plaintiff 's motion should be granted.

Defendant's motion, which seeks on this cause of action an order and a judgment that plaintiff's claim be given priority nine under the same regulation, will therefore be denied under the tentative decision.

I want to begin my analysis by examining the regulatory scheme which defines the requisite for priority six allowance. It's necessary to look at 389.11(a)(6) itself, as that paragraph is worded, and to look at it also in the light of 389.11(c). Those two paragraphs of the regulation, (a)(6) and (c) must in my view be read together. In my view they should be read to determine when and under what conditions a claim gets a priority six status. It is on this approach that plaintiff has argued the matter in the papers.

Defendant likewise argues that the two must be looked at together and that the requisites for priority six are found in the

two paragraphs looked at together. So the approach of the parties is the same. Defendant concentrates its fire on the contention that plaintiff's claim does not meet the- requirements of subparagraph (c).

I want to now abstract for you what I believe are the requirements of a priority six claim when those two paragraphs are read together. As paragraph 6 says, the claim must be one which has accrued and become unconditionally fixed on or before the date of default. Date of default is a defined term, and in our case both sides agree that date is May 10, 1990.

In my tentative opinion, plaintiff's claim was unconditionally fixed on that date, May 10, 1990. In my view, plaintiff's claim was also accrued on that date. Accrual is a term which requires a reading of paragraphs six and subparagraph (c) together. These debentures had not matured on the date they were repudiated by RTC, but under paragraph (c) the repudiation by RTC gives these claims the necessary status.

Paragraph (c) says that if there has been a rejection or repudiation of an executory contract by the receiver, the claim that arises from that repudiation or rejection, if allowed — and let me just interdelineate that we have just allowed it — if allowed, shall be classified as a claim that has accrued and become unconditionally fixed on or before the date of default. That's what paragraph (c) says. The question then becomes the single question as to whether this repudiation was of an executory contract.

Plaintiff says the contract of that moment of repudiation was executory certainly on the part of the bank because the debentures hadn't been paid off yet. That is unquestionably true. The government says that the term "executory contract" must be read to refer to contracts which are executory as to both parties thereto, and that the term therefore cannot apply to a contract like ours which the government says had been fully performed by one party, namely, the lenders of the debentures.

The trustee says that for a contract to be executory it must be as to both sides — no. Let me phrase that differently. The trustee says that even if a contract to be considered executory should be executory as to both sides, this particular contract on the moment of repudiation still qualified, because the trustee still had further duties to perform both before and after it collected the money back which had been lent to the bank by the debenture holder.

There could be no doubt that the trustee did have continuing duties such as registering debentures, re-registering them when transferred, issuing executes for lost debentures and also the continuing duty to collect or attempt to collect the money, and when collected, to pay it out to the holders of the debenture. Some might conceivably regard all of those many duties as ministerial or clerical. I would not. At least one of them is more than ministerial and one of them, if not performed, could conceivably result in a partial but material default by the trustee.

I refer to the duty after payment of the debentures by the bank to return unclaimed monies to the bank. That is found in the trust instrument itself as Section 7.03. That is a duty that is mutual between the trustee and the bank under Section 7.03. The trustee is, as that paragraph of the debentures — as that paragraph of the instrument says, the trustee is, I am quoting, required to pay the monies to the bank on the bank's request for the monies.

The Texaco case relied on by plaintiff cited at 73 Bankruptcy Reporter 960, a decision of the bankruptcy court in the Southern District of New York in 1987, does support the plaintiff's position and the one tentatively taken by the court. The decision defines an executory contract as one in which some duties are left to be performed on each side. Applying that definition, ours is an executory contract as to both sides, both the trustees and the bank.

We also have some administrative history that helps the trustees on this question. And that in my view undergirds the tentative conclusion I have reached. When the regulation we are talking about, 389.11, was first published by the defendant's predecessor,

the Federal Home Loan Bank Board, there were comments to the regulation, comments of the agency. The agency commented that the term "executory contract" could be interpreted in the light of bankruptcy law, and in bankruptcy law, it is important to know whether a contract is executory or not. It has important consequences. Texaco, the Texaco decision is just such an interpretation as the comments referred to. It is an interpretation of the term "executory contract" in the light of bankruptcy law.

The government, although they recognize that the comment mentioned favors the plaintiff, says that some of the administrative history also helps their position. The government says the administrative history helps them because the comments mentioned and even emphasized the so-called Countryman — that's a case underlined, Mr. Reporter — the Countryman definition of executory contract. The government goes on to argue that our contract as of the moment of repudiation did not meet the Countryman definition. But the comment does not say that Countryman is absolutely applicable. The Texaco court took note of the Countryman decision and reached the result that I have mentioned favorable to the trustee. So all in all, it appears to me that the administrative history aids the construction of events by plaintiff, particularly the part of that history that goes on to say that Countryman need not always be followed exactly. You will find that at 50 Federal Register, page 48976 and 1985.

It cannot be overlooked that Texaco is a bond-indentured case like ours and no contra cases cited by the government are of that nature. Thus, it seems to me we say and hold that the instant claim qualifies under subparagraph (6), read in the light of subparagraph (c), qualifies as a priority six claim.

Now we have to take note of a number of arguments made by the government which they say should lead the court to the opposite result. I'm going to mention them separately.

Argument No. 1: The government asks the court to focus attention on the regulation 30 — excuse me, 389.11(a). That

paragraph requires that for a priority, a claim must be proved to the satisfaction of the receiver. The government is claiming that that language is so broad it permits the government to be arbitrary, capricious, ungoverned in their discretion about whether to decide that that claim has or has not been adequately proved. I simply don't agree with that. I think that is far too broad an interpretation of this section, but I don't think it's necessary for me to construe this section so as to define what the limits are of the agency's discretion.

First of all, the agency has agreed that our plaintiff's claim is entitled to priority nine. Once they have agreed to that, in my view, the agency has admitted the claim is proved, because under 389.11(a) it could get no priority unless it was proved. Moreover, by the judgment of the court rendered on the first cause of action, I have allowed the claim. Implicit in allowance is certainly a determination by the court that the claim has been proved. So I think that disposes of Argument No. 1 and I'm going on to Argument No. 2.

The government says that our analysis that you have just been through cannot be correct, because under it every claim based upon a repudiated executory contract would be entitled to either priority six or priority seven. To that I would say that if true, and it may not be, even if true, so what? If it meets the definition of a priority six claim it is a priority six claim and is entitled to that priority. The government drafted these regulations and must live by them. It isn't necessarily evil that a claim which meets the definition of the regulation can get either a six or seven priority. That doesn't make the analysis invalid.

Now I pass on to Argument No. 3. The government says that in our case plaintiff's claim must be classified as priority nine even though it meets every requisite of priority six, because plaintiff's claim here involves a subordinated indebtedness. The government is right in that the claim does involve a subordinated indebtedness. But in my view, that doesn't necessarily reduce the priority to which the claim is entitled from six down to nine.

The government seems to argue that the analysis I have adopted as the tentative analysis here would make priority nine and its definition meaningless. Again, I think they are not correct in this. Priority nine would still be available for subordinated debt claims where the institution went into receivership prior to maturity and where the debt has not been repudiated. Of course we are dealing with a repudiated debt.

I pass on to Argument No. 4. The government argues that even though I hold that Arguments 1, 2 and 3 are not availing, and even though the analysis the court has made earlier placing this claim in priority six is analytically correct, even if all those things are true, the agency still has the option and right to treat the instant claim as lower than priority six.

The government, the agency says, when they repudiated this indenture indebtedness, they utilized or said they utilized a certain statute, 12 U.S. Code Section 1821(e), small E in parenthesis. I looked at it. So far as I can see that statute says nothing which is inconsistent with the regulations that the court has been applying, construing and discussing. The agency seems to think there is some inconsistency and they seem to think that because the regulations, particularly and especially 389.11, came before the statute was enacted, the enactment of the statute permits them to forget about the regulations. I just don't agree with the agency in this at all.

The statute also says, as the agency pointed out, that if the RTC finds an obligation to be burdensome, it may for that reason repudiate the obligation. The statute goes on to provide that in such situations of repudiation, of burden obligations, damages are limited to actual direct compensatory damages. The agency is right. The statute does say those things. But the statute does not deal with priorities and does not purport to set aside or to effect — excuse me — to affect the priority system that was constructed in the regulations and existed when the statute was adopted. I construe the statute as not affecting the priority system, as not

affecting the priority to which these plaintiffs were and are entitled, namely, priority six.

Now, under the stipulation of the parties, I have in my view no function remaining in fixing or awarding damages. The parties have agreed on the amount of the claim. Thus, the provisions of the statute which limit damages would be in my view of no further force and effect in our case.

At least one more or two or more arguments need to be discussed.

Argument 5: The agency points out that one section of the regulation that I have been discussing and have utilized in determining plaintiff's priority has been dropped after the events in question in our case and after the statute 12 U.S.C. Section 1821(e) was enacted. That is a factually correct contention. Subparagraph (c) of 389.11 has been dropped. It is no longer a part of 389.11.

And incidently, the regulation now has a different number also. Instead of 389.11, it is 360.2. But in my view, the fact that subparagraph (c) was later dropped has no effect on our case. When RTC argues that section (c) was dropped because of a conflict with the statute, they haven't any specific proof of that. And as I have already said, in my view there is no such conflict. A general statement when they re-did the regulations about ending redundancies and inconsistencies in the context of the several and many regulatory changes they made certainly does not prove the agency's point here.

The RTC in argument goes even a step further. They say look, paragraph (c) has been dropped. Therefore, when you judge plaintiff's claim and its priority, please forget that there ever was a paragraph (c) and judge their priority on the way the regulation now reads, one without any subparagraph (c). I simply don't agree with the agency in this. I must read the regulations and give the claim the priority to which it was entitled under the regulations as they existed at the time the claim matured.

The argument made by the agency is really one of retroactivity, and in my view I am obligated to reject that claim and to follow a decision of the Ninth Circuit on this point, FDIC versus New Hampshire Company, 953 F2d. 478, decided by our circuit in 1991. The circuit says there that substantive changes cannot be applied retroactively because it would be a manifest injustice. Surely the changes that we are discussing are substantive, not procedural. To apply them retroactively would also result in a manifest injustice. It's interesting to note that the agency itself called them substantive when they made them. For that language see 50 Federal Register at 48971.

Well, I'm sorry. We have a couple of more arguments that must be dealt with. Argument 6 is next. The government says that if everything else fails, they are entitled to have this claim classified as priority nine and not six, because the capital obtained from these debentures was used to furnish regulatory capital. Plaintiff's admit that the capital was so used.

The RTC in advancing this claim is relying on a group of cases, the most important of which is Northwest Racquet, Swim and Health Club versus FSLIC, a district court opinion, 721 F.Supp. 211, decided in Minnesota, 1989. District court opinion of course is not binding on me, but even if it were, it is distinguishable. The Racquet Club case is not a repudiation case. It's the repudiation in our fact situation which enables the plaintiff to get to priority six. In the absence of that repudiation, we might well reach the same result that district judge reached in Racquet Club, namely, a subordinated debt of this kind should not get the same priority as general creditors. But the agency drew these regulations, plaintiffs didn't draw them. The agency must held to observe and abide by its own regulations. Under the regulations in a repudiated situation the claim can go to priority six. As somebody once said, that's how the cookie crumbles.

The last argument I want to deal with, Argument 7, is this: The agency says that the fact that agency debentures were on their face subordinated debentures precludes them from ever getting to

priority six. But this argument overlooks some specific language in the indenture agreement. The language I'm speaking of is Section 3.09(a), small A in parenthesis, of the indenture agreement there. The indenture says that if the institution goes broke and the indentures are not assumed by another successor institution, the indenture and the bond holders shall have the priority available to them under appropriate regulations of the agency.

That's what my tentative ruling is. This claim has the priority to which it is entitled under the appropriate regulations of the agency. In my view, that priority is not affected, it is not divested, because plaintiffs started out with subordinated debentures.

I'm sorry to have kept you so long. I have finished this rather lengthy and laborious explanation. After recess we will hear from the agency's counsel first and I may have something to say about the proposed form of order. In the recess time the agency might look at the proposed order both in terms of Cause of Action 1 and Cause of Action 3.

All right. We will take a ten-minute recess, but before I even take it and before I hear from either of you, I have to congratulate counsel on both sides for the thoroughness and general excellence of the papers.

(Recess taken.)

THE COURT: Mr. Tumpson, how much time will you require?

MR. TUMPSON: Your Honor, I think this will probably take half an hour.

THE COURT: I am certainly going to allow you 20 minutes. Try very hard to compress it into that, would you, please?

MR. TUMPSON: Yes, Your Honor.

THE COURT: Go ahead. Excuse me one second while I get the a yellow pad so that I can make notes as you are speaking. Mr. Clerk, have you got one?

THE CLERK: I do not, Your Honor.

THE COURT: See if the law clerks have one.

Go ahead, Mr. Tumpson.

MR. TUMPSON: Your Honor, the — as a preliminary point to my arguments I first like to address the question of whom these subordination clauses in the indenture were designed to protect.

THE COURT: Tap that mike, would you? Little bit up so you are speaking more directly into it.

Go ahead. I heard you.

[MR. TUMPSON]: If it please the court, subordination clauses especially when used for regulatory capital are designed not to protect the receiver of an insolvent institution, they are designed to protect the innocent depositors and general creditors of that institution by providing an equity cushion in order to protect those people.

The receiver's role in this case is as a fiduciary to protect those creditors and depositors and not for its own benefit. The provisions of the agreement in a number of places show a third-party benefit to those senior indenture holders and to the depositors to protect their interests in the subordination provision. In this case, their interests would not be protected if the court rules as it has tentatively said.

Section 4, 4.01, specifically says that the subordination provisions are for the benefit of the senior creditors of the institution, not the receiver and not the institution. And they say that the senior creditors have the right to enforce these provisions. They also say in another section, I believe it's 4.04, that nothing that the institution does can defeat the rights of the senior creditors to the subordination. Nothing. This is what the trustee and the debenture holders agreed to. Any move that we make as a receiver of that institution cannot defeat the subordination provision under its own terms, and the terms which the trustee has admitted are still affected — effective, excuse me, between it and

those that it was ordered under the indenture to serve, the debenture holders and the senior creditors. Those are the people whose fortunes are at issue here, not the Resolution Trust Corporation, and that underlies most of our arguments.

I would like to address the court's holding —

THE COURT: Let's see what you are talking about. You are saying regardless of the regulatory scheme we erected, regardless of our definition of our priorities and specifically priority six, because of that clause, you cannot give priority six to those debentures holders. Is that what your argument is?

MR. TUMPSON: Because of that clause and also as we cited in our papers, Your Honor, there is a specific clause in the indenture that says to the trustee we the debenture holders want you to enforce the subordination provision and order you to, and appoint our attorney-in-fact to enforce the subordination provisions, and under the terms of the document the trustee has no power to attempt to defeat it. That's what the instrument says and it's because —

THE COURT: Well, the regulations could easily have taken account of such a problem. There isn't a word about that in there, is there?

MR. TUMPSON: Your Honor, the regulations are designed to allow the receiver to, in a procedural way, map out who gets what after the institution —

THE COURT: More than that. They set up priorities and what the rights are, and has as a priority, as I remember, equal to the general creditors, doesn't it, roughly speaking? And if they meant to say in a situation where there is a clause of this kind in the indenture, you don't get it, be very easy to say that.

MR. TUMPSON: Well, Your Honor, the regulation we are dealing with is not a model of clarity and —

THE COURT: That's not my fault nor is it plaintiff's fault.

MR. TUMPSON: Well, Your Honor, what I'm saying is that the parties who are at interest here, the parties who are to be harmed here and the parties who are to be protected by the indenture are not the ones who repudiated. And what I am saying to the court is if the receiver could have done something to them under the indenture, that might be a problem; but the indenture itself, the document that the trustee rises and falls, lives or dies on, says they can't default that subordination position.

THE COURT: Don't strike the podium.

MR. TUMPSON: I'm sorry.

THE COURT: Go ahead.

MR. TUMPSON: That is what the document itself says, and that document vis-a-vis the debenture holders vis-a-vis the senior creditors still bind those people, still bind them, and they were honor-bound and duty-bound and as far as the debenture holders have a fiduciary duty to enforce this provision. And we will say those are the people who are going to get hurt here, not the receiver.

As far as the court's observation that we agree, that is, the RTC agrees that section 389.11(a) (6) and 389.11(c) must be read together, we do not ask and have not in our papers —

THE COURT: I thought you had. Those papers will speak for themselves. Go ahead.

MR. TUMPSON: We have addressed the contentions about the application of the statute by the trustee, but —

THE COURT: What is then your — what is the role of (c)?

MR. TUMPSON: Our contention is that (c) doesn't exist, that (c) —

THE COURT: It existed at the time.

MR. TUMPSON: No, Your Honor. We — our contention is that (c) became useless and worthless at the time that FIRREA came into existence. We say that —

THE COURT: Without any amendment of the regulations whatsoever, right?

MR. TUMPSON: The case law says and the Supreme Court case law says that if a statute which governs the situation is not in harmony with a regulation then the regulation is a nullity.

THE COURT: Again, it would have been very easy when the other agency came into being to say (c) is no longer effective.

MR. TUMPSON: Well, Your Honor —

THE COURT: Is there any case law that adopts this view, that the court must disregard a section of the regulations because the agency changed its name and some of its composition and power? The new agency was a successor to the old one, wasn't it?

MR. TUMPSON: Well, no, that's not so, Your Honor. The —

THE COURT: It remained bound by the regulations, did it not?

MR. TUMPSON: Firstly, the RTC —

THE COURT: Didn't it?

MR. TUMPSON: The RTC was not bound by that regulation because the statute was not in harmony with it. At any rate —

THE COURT: Go ahead. It would have been very easy to say that, wouldn't it, when they create the new agency, please hereafter disregard sections (a), (b) and (f), they are not in harmony?

MR. TUMPSON: Well, you have to look at the situation that occurred. It was not simply the same agency with a new name that was created, and maybe that requires some explanation before we go further. When the change was made, right before

the day FIRREA was enacted, there was a Federal Home Loan Bank Board —

THE COURT: Excuse me. Hold on a second, would you?

Go ahead.

MR. TUMPSON: There was in addition a Federal Savings and Loan Insurance Corporation and there was a Federal Deposit Insurance Corporation. When — and just to make it clear who these were, the Federal Home Loan Bank Board's duties were to enact regulations governing not only the examination of banks and protection of banks and depositors, but also regulations governing the FSLIC.

Secondly, the FSLIC had the insurance, deposit insurance function and it had the function of being the receiver or conservator of failed institutions. The FDIC had nothing to do with savings and loans at all. It was a bank regulator and had both of those duties combined but only as far as banks, not savings and loans.

On August 9th, 1989, Federal Home Loan Bank Board vanished, federal Savings and Loan Insurance Corporation vanished, and their functions were not transferred to the same type of agency so that it was just a name change. The Office of Thrift Supervision had no supervisory authority over the RTC. The Office of Thrift Supervision was the only bank regulator. The RTC had only the job of becoming the receiver or conservator of failed banks. That was its sole job.

THE COURT: Well, I appreciate you know the history very intimately. I don't think it is entirely relevant and I hate to see you use your time for that. What you are really trying to do is document a basic argument that ceased to apply, right?

MR. TUMPSON: Yes, but —

THE COURT: All right. We will have the plaintiff deal with that when its turn comes. You made the point.

MR. TUMPSON: Well, all I was saying, Your Honor, is if they could have instantly known everything they had to do in this fairly chaotic situation and if they could have dealt with everything on that first day, (c) would be gone on the first day. And as our papers have said, what happened was, firstly, they were asked to get all these regulations out of Article III of the 12 C.F.R. They did. They moved them en masse in to a section called Regulation Transfers from SLIC and then after they had a chance to look at everything they did get rid of (c) as soon as they could.

THE COURT: Later on after the operative events in our case.

MR. TUMPSON: Well, Your Honor, not after the operative events; after some of them.

THE COURT: Go ahead.

MR. TUMPSON: In the middle of the period in which the RTC was entitled to consider these claims this thing was taken out. November 5th, 1990 was not before the 180 days had expired, the 180 days for consideration, so they still had time to consider the claim by the trustee after this regulation was gone. So it's not quite true to say all of the operative events had occurred. And when this case was filed, which is another operative event, there was no section (c), so, again, we do not agree that section (c) has a place in this lawsuit.

THE COURT: By the way, I think I ought to straighten out right away for the record, Countryman is of course not a case, he is a professor at Wisconsin Law School.

MR. TUMPSON: By the way, I have to straighten one thing out for the court for the record. My papers, one of them was put through a Spell Check and I had a heading that was supposed to be in Latin and somebody changed to it English so it should have read in haec verba no velvant, not relevant. I apologize to the court.

THE COURT: I'm not enough of a Latin scholar to have picked up the difference, but go ahead.

MR. TUMPSON: One thing I'd like to address also, the court has said that the claim had to be allowed under section (c) and the court said I just allowed it. I would just like to point out to the court that the receiver never allowed this claim, and that if the court just allowed it, it allowed it at a time —

THE COURT: The court can treat a claim that is entitled to allowment and to say it has been allowed. Go ahead.

MR. TUMPSON: We would briefly like to address the court's comment on the executory — or the court's holding on executory contracts question. In this case there were — we say there were certain ministerial duties to be performed by the trustee. It is our position that none of the duties were material and the court has addressed that, but also that none of the duties were owed to Santa Barbara Savings.

Now, as far as if the — if the trustee has a fund and there is money left over after everything has been performed by Santa Barbara Savings, then the contract isn't executory as to Santa Barbara Savings at that point — but that hasn't occurred. The obligation to turn something over after everything is done has been addressed by the court and it's been addressed in our papers.

The In re Rehbein case addressed the obligation to deed property after all payments have been made and it said that was merely ministerial. In this case we have what is essentially a note and we have a fully funded note, and under those situations the bankruptcy law finds that those kinds of contracts are not executory.

The In re Texaco case was a ruling out of Texas by a bankruptcy judge. It is entitled to little weight in this jurisdiction and it is not a district court opinion.

THE COURT: Except executory contracts are terms of art in the bankruptcy court, are they not? They have a big significance in bankruptcy law.

MR. TUMPSON: Well, Your Honor —

THE COURT: So that it is entitled to weight, especially in view of the fact that in your own comments you said interpret this term as per bankruptcy.

MR. TUMPSON: Well, Your Honor, the court in the in re Texaco case did no analysis of the factors that the Countryman decision. They just set out a number of things that they said were things to be done. But as the court could see, I think by looking at them they were all owed to somebody else and they were not material things, and what we are saying there is that if it's not material, then it's not executory. This is just a note. And I think that's all I need to say on that.

We in addressing the question of whether this claim had been proved to the satisfaction of the receiver did state that under the way the statute is written, that is, section 1821(d) (5) (e), that the decision of the receiver needn't be even rational the way it looks. We are not saying that we were not — that we were arbitrary or capricious. We had a claim, and if you look at the request for the claim it says we want so much money on a level 6. It didn't say we want so much money and then in a different claim say: And after you granted that, give us a level 6. Or it didn't say in the alternative we'd rather have a level 6. It said we want eight million dollars on a level 6 and so we did not grant that claim and would not grant the claim.

Obviously we felt as far as the receiver was concerned that that was not proven to our satisfaction. The point that was being made is that the receiver doesn't have to approve a claim, and if it doesn't approve the claim, then it's not proved to the satisfaction of the receiver and —

THE COURT: You say the receiver has a right to reject the claim even though rejection is clearly contra to law?

MR. TUMPSON: The receiver has the right to reject any claim that it is not satisfied with and —

THE COURT: But suppose the court says that rejection is contrary to law. You still insist you have a right to reject it?

MR. TUMPSON: Well, if the receiver doesn't think it's contrary to law and the court then reviews the case —

THE COURT: You are saying in effect that the party aggrieved has no remedy because the receiver in its untrammeled discretion can say to heck with the law, I'm just not going to approve it? That can't be the law.

MR. TUMPSON: No, Your Honor, I am not saying — the statute provides for review of the claim itself by the court. But the statute specifically says that the decision of the receiver is not reviewable by the court. It says it specifically, and what could that mean but that the court can say yes, the claim is good —

THE COURT: You have your version what that leads to, I have mine. Let's go ahead.

MR. TUMPSON: I'd like to address the argument concerning level 6 or 7. The court has an obligation to give effect to the entire statute and to ameliorate its provisions. Level 6 provides that it applies to all claims which have accrued and become unconditionally fixed on or before the date of default. Level 7 of 360.2 or 389.11 says it applies to all claims other than claims which have accrued and become unconditionally fixed on or before the date of default.

Those two by any logic, those two standards combine to comprise the '89 version of claims, and no other claims could be and no other provision of 389.11(a) could have any meaning after those two provisions. Impossible. And yet they say level 8, claims for income taxes, level 9, claims for subordinated debt, level 10, claims for shareholders. How could those have any meaning at all if the court interpreted all claims which have accrued and become unconditionally fixed would mean the entire universe of claims?

The reason that it makes a difference that these other sections are here is because — or maybe I am saying this backwards.

If the court gives meaning to each of the provisions, it has to interpret these two sections to exclude more specific sections contained in 389.11(a). Otherwise, no subordinated debt could ever be subordinated.

THE COURT: Your 20 minutes are up. You want a minute or two to finish?

MR. TUMPSON: Yes, Your Honor. I would like to address just two more items.

THE COURT: Quickly, please.

MR. TUMPSON: The first is the retroactivity cases. In this case, we are bound as the court has said by the Ninth Circuit decision in Federal Deposit Insurance Corporation versus New Hampshire Insurance Company. That case, when it ruled, it stated specifically that it was ruling because there was no prohibition against retroactive application in the legislation and because manifest injustice would not result. That case dealt with the application of a statute of limitations that threw the plaintiff out of court, and they said they are going to retroactively apply the statute of limitations. They said that it was because it was in another part of the decision because it was procedural or remedial —

THE COURT: I understand now. Have you anything further? You're way past your time now. Give you one more minute.

MR. TUMPSON: All right. The Northwest Racquet, Swim and Health Club, I would just like to say again to the court that the depositors and in general creditors are the object of these cases. And just to end my argument, the court said in that case in such situations fairness and equity dictate that investors having undertaken the greater risk give way to the depositors and general creditors by honoring the regulatory obligations they have assumed. It is the regulatory interest of protecting the innocent

depositors and general creditors which drove the Second Circuit's analysis in Weis which we now adopt.

My point being that this case does not stand for the fact that if you want to rescind for fraud, it's one thing, and if there is a repudiation or simple breach argument —

THE COURT: I think there is a vast difference between the two. You are protecting this capital against rescission of the people who gave it for fraud. But here the claim arises from a repudiation by the receiver of the agency — of the institution.

I want to hear from plaintiff now. Perhaps you will first address the argument based on 4.01 of the indenture and the language about subordination for the benefit of senior creditors.

MR. MacNAB: Thank you, Your Honor. I think that the way that I have attempted to analyze that, I think the way the court has analyzed the issues, you have a precise provision of the indenture section 3.09 that very clearly overrides and supersedes by its very terms every other provision in the indenture in certain specific instances and circumstances which are entirely met in this case. That is the appointment of a receiver, the purchase and assumption of certain obligations where those obligations are not assumed.

THE COURT: That's the language I referred to in —

MR. MacNAB: The language that you referred to. I believe that, if we are relying on any provision of the indenture, we are saying any part of it survived this repudiation and can be mutually enforced or mutually looked at, then that provision has to have survived along with the subordination provisions of Section 4 which I think are clearly repudiated.

THE COURT: All right. Perhaps you will now switch to the argument made that subparagraph (c) must be disregarded because it is inconsistent with the new agency FIRREA, isn't it?

MR. MacNAB: Well, the RTC and inconsistent under FIRREA. I would simply cite the court, if I might, to the provisions

of FIRREA itself. I am talking about Section 401 of FIRREA which is found in the Exhibit G to the declaration of Mr. Opdyke that I put in, putting those provisions in front of the court, page 126. This is Congress speaking itself. This isn't an agency. And I'm sorry, I — I'm not feeling well today.

THE COURT: You want some water?

MR. MacNAB: No. I'm okay. I'm just kind of not feeling well.

All orders, regulations, determinations, and regulations which have been made, prescribed, allowed to become effective by the Federal Savings and Loan Insurance Corporation, that's FSLIC, the Federal Home Loan Bank Board, including orders, resolutions, determinations, regulations which relate to the conduct of the conservatorships and receiverships. That's Section 3 —

THE COURT: That's what we are dealing with right here, isn't it?

MR. MacNAB: That's what we are dealing with here. Or by a court of competent jurisdiction, the performance or functions which are transferred by this act and which are in effect on the date this act takes effect, that was August 9, 1989, shall continue in effect. According to the terms of such orders, regulations, determinations — I'm sorry.

THE COURT: That's all right. What you are saying is the government has got legislation that says all the regs continue.

MR. MacNAB: Precisely.

THE COURT: And they certainly don't say all regs continue except those that are inconsistent. It says all of them continue, doesn't it?

MR. MacNAB: Well, it goes on to say until repealed —

THE COURT: Okay. I don't think you need go any further.

MR. MacNAB: But that's — I think that's my essential argument in response to that. I could become — the more I think

about it, make a more sophisticated argument if the court wished. The repudiation section enacted in FIRREA, 1821(e) (1), is no different, at least it is no different in substance and effect than the regulation which allowed me repudiation prior to enactment of FIRREA. The regulation prior to FIRREA allowed the receiver to repudiate contracts or leases which they considered burdensome. I believe I am virtually quoting the regulation. FIRREA, 1821(e) (1) allows the repudiation of leases or contracts which the receiver finds to be burdensome and the repudiation of which will effectuate the orderly administration of the estate. The prior law is really no different than the new law.

THE COURT: Well, all right. Let's pass on now. Perhaps you will answer the argument made that an executory contract cannot be one where obligations are owed to somebody other than the other contracting party.

MR. MacNAB: I don't — I think that — understand, I don't think the Texaco case makes that distinction. I think the Texaco case is the only case we found and that anyone has found that deals with a trust indenture in this precise case.

Secondly, I think, as the court observed, there are some very significant executory obligations running from the trustee to the other side to SBS.

THE COURT: Including paying over that extra money.

MR. MacNAB: Precisely so. They are going to effect the residual beneficiary of this trust. That's the direct beneficiaries, are the bond holders, debenture holders. If there is any residual corpus, it belongs to SBS.

THE COURT: In that sense, it is different from and different from a note. The note obligees get whatever money there is.

MR. MacNAB: Well, Your Honor, if you want to take the time, I could site to you 15 other obligations other than the payment of money undertaken by SBS in this indenture, each and every one of which was deemed by the parties at the time they

entered into the indenture to be sufficiently important that if breached, constituted an event of default.

THE COURT: Well, I don't think that's necessary. What do you make of the argument that this can't be called executory under the Countryman definition?

MR. MacNAB: I think the Countryman — I think it can. I think we have executory obligations on both sides.

THE COURT: How would you phrase the Countryman definition?

MR. MacNAB: That there are executory obligations remaining to be performed by both parties, that the breach of which would constitute a material default.

THE COURT: Now, are there any other matters that were raised by counsel that you feel you ought to be speaking on for the record?

MR. MacNAB: I do not.

THE COURT: All right. The court now adopts —

MR. TUMPSON: Your Honor —

THE COURT: No further argument will be appropriate or necessary. The court now adopts the tentative decision expressed by the court. I will do my own order. I would like plaintiffs to order a transcript because I want to incorporate it by reference. Otherwise, I would have the great labor of saying all that all over again in writing. And I want to change the order submitted by the plaintiff at least so that I can incorporate by reference the transcript. I would like to look at that order again with defense counsel to see if there is anything else in there that defense counsel would object to. I'm referring, Mr. Tumpson, to the proposed orders granting plaintiffs motion for summary judgment — by the way, for the record, Mr. Clerk, defendant's motion is deemed — is denied. We will put that?

THE CLERK: Yes, Your Honor.

THE COURT: Entitlement not having been shown as a matter of law.

Mr. Tumpson, take a look at the proposed order granting plaintiff's motion. You have seen it before. Is there any of its language that you would object to as to form?

MR. TUMPSON: Your Honor —

THE COURT: Come to the podium, would you?

MR. TUMPSON: I'm so sorry.

The — at the beginning of this motion you were discussing whether it divided it into Count 1 and Count 3. It does not.

THE COURT: Well, the first sentence of the operative paragraph, paragraph 1 deals with Count 1.

MR. TUMPSON: Well, it says second sentence, such claim —

THE COURT: The first sentence deals with — and I will separate them. You want to be heard with respect to that language as being the grant of judgment as to Count 1, namely, the claim is allowed? That is all that will deal with, then I will have paragraph 2.

MR. TUMPSON: Yes, Your Honor. Well, other than that, we have no —

THE COURT: All right. Now, the second sentence deals with the other cause of action. It does not mention priority six. Should it not? I am addressing plaintiffs. That's really what you sought here.

MR. MacNAB: Your Honor, I must confess I did not bring a copy of the proposed order with me. I am very sorry.

THE COURT: Well, I will get you one. That's not the best thing in the world, you know. I hope you succeed in an important motion which will be — which result will be embodied in an order you have written and you don't have it ready to look at.

MR. MacNAB: I apologize very much —

THE COURT: I'm loaning you one.

MR. MacNAB: Thank you very much.

THE COURT: Now, we are discussing the second sentence of paragraph one on page 2. You will notice how the priority adjudication is written. I don't recall that that was your motion either. I think the whole argument has been given priority six, isn't it?

MR. MacNAB: Correct. I think we tried to pick up the language of the regulation, part 6 in that sentencing, but I guess may have failed to do that.

THE COURT: Well, do you want me to use this language starting with priority equal to claims, et cetera, and also use the language, the same being priority 6?

MR. MacNAB: I think that would be very helpful.

THE COURT: Okay. Now let's see what the defendant has to say about it.

MR. TUMPSON: Your Honor, at the risk of causing the court problem, I have read the first sentence again a little more carefully and we would object, I'm sorry, to the second part of the sentence, "The claim in its entire amount shall be treated as allowed by the RTC under the statute." Either this court allows it or the receiver allows it but the court cannot say that the receiver is allowed.

THE COURT: What do you suggest as the alternative language?

MR. TUMPSON: Just take out the second part of the sentence.

THE COURT: You mean end the sentence "as allowed in its entire amount." Period?

MR. TUMPSON: Yes, Your Honor.

THE COURT: What does the plaintiff have to say about that?

MR. MacNAB: I don't think we want them changing that part of the order, Your Honor.

THE COURT: How is this any different? If you allow it in its entire amount, that's what the first part of the sentence says. You want to say "The claim in its entire amount shall be treated as allowed"? All you are saying is okay, the judge is allowing it. Now the judge is telling RTC to treat it as allowed. Okay. Out of an abandonment of caution I will put that in.

MR. MacNAB: Thank you.

THE COURT: All right. Now, Mr. Tumpson, what about the second sentence?

MR. TUMPSON: We have no objection to the court if it deems it necessary to put in reference to the level 6.

THE COURT: Yes, Okay. And the rest of the language you have no objection to, I take it? Now, as to form. You are not giving up any rights.

MR. TUMPSON: Well, I would think that rather than using this language which is not in a level 6 priority, which is including those RTC or subrogee or transferee, rather than just citing the statute would be preferable to us.

THE COURT: Well, let's see what is going on here, because this is too subtle for me. Will the plaintiffs tell me where this language came from? Are you tracking something from a statute or regulation?

MR. MacNAB: Yes, Your Honor. I'm taking precisely the language in 389.11(a)(6), except I put the word "RTC" instead of "corporation." Six reads as follows —

THE COURT: All right. Let me then ask the defendant. With that explanation in mind, how can you object to that? I am checking the language with that to make sure they have tracked it and you know that language by heart anyhow, Mr. Tumpson. You know the regulations like you know the back of your hand.

MR. TUMPSON: Your Honor, it doesn't track the entire statute and it doesn't talk about whether unliquidated or liquidated. I just thought it would be more precise to say as just pursuant to Section 360.126.

THE COURT: What has he left out?

MR. TUMPSON: Well, the words "whether unliquidated or liquidated." I don't know —

THE COURT: Let me suggest something to you. After we adjourn, write out by hand, in handwriting, and I will ask the bailiff to stay so he can photostat it for the court and for opposing counsel your substituted language for the second sentence, but I want this method or form followed. In other words, I'm not just going to say it would be entitled to priority six. I want the language tracked as he has done. But if you think something is left out that is indispensable, put it in, leave out the comma. Will you do that, please? Or can you tell me right now what interdelineation you would make.

MR. TUMPSON: Your Honor, I don't find anything indispensable.

THE COURT: All right. Very well. Then we will use this form. All right. Thank you, gentlemen. I will do my own order here. Thank you very much.

(Hearing concluded at 2:08 p.m.)

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.: Reporter's Certificate

I, JOHN G. TURMAN, Official Court Reporter, do hereby certify that the foregoing transcript is a true and correct copy of the proceedings in the above-entitled case taken on the date and at the time indicated therein.

Dated this 20th day of August, 1992.

JOHN G. TURMAN

APPENDIX D

12 C.F.R. § 389.11 (1990)

PART 389 — RECEIVERSHIP RULES

* * *

§ 389.11 Priorities.

(a) Unsecured claims against an association or the receiver that are proved to the satisfaction of the receiver shall have priority in the following order:

(1) Administrative expenses of the receiver, including the costs, expenses, and debts of the receiver;

(2) Administrative expenses of the association, *provided* that such expenses were incurred within thirty (30) days prior to the receiver's taking possession, and that such expenses shall be limited to reasonable expenses incurred for services actually provided by accountants, attorneys, appraisers, examiners, or management companies, or reasonable expenses incurred by employees which were authorized and reimbursable under a pre-existing expense reimbursement policy, that, in the opinion of the receiver, are of benefit to the receivership, and shall not include wages or salaries of employees of the association;

(3) Claims for wages and salaries, including vacation and sick leave pay and contributions to employee benefit plans, earned prior to the appointment of the receiver by an employee of the association whom the receiver determines it is in the best interests of the receivership to engage or retain for a reasonable period of time;

(4) If authorized by the receiver, claims for wages and salaries, including vacation and sick leave pay and contributions to employee benefits plans, earned prior to the appointment of the receiver, up to a maximum of three thousand dollars ($3,000) per person, by an employee of the association not

engaged or retained pursuant to a determination by the receiver pursuant to the third category above;

(5) Claims of governmental units for unpaid taxes, other than Federal income taxes, except to the extent subordinated pursuant to applicable law; but no other claim of a governmental unit shall have a priority higher than that of a general creditor under paragraph (a)(6) of this section;

(6) Claims for withdrawable accounts, including those of the Corporation as subrogee or transferee, and all other claims which have accrued and become unconditionally fixed on or before the date of default, whether liquidated or unliquidated, except as provided in paragraphs (a)(1) through (a)(5) of this section, provided, however, that if the association is chartered and was operated under the laws of a state that provided a priority for holders of withdrawable accounts over such other claims or general creditors, such priority within this paragraph (a)(6) shall be observed by the receiver; and provided further, that if deposits of a Federal association are booked or registered at an office of such association that is located in a State that provides such priority with respect to State-chartered associations, such deposits in a Federal association shall have priority over such other claims or general creditors, which shall be observed by the receiver;

(7) Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims under paragraph (a)(6) of this section, Provided that any claim based on an agreement for accelerated, stipulated, or liquidated damages, which claim did not accrue prior to the date of default, shall be considered as not having accrued and become unconditionally fixed on or before the date of default;

(8) Claims of the United States for unpaid Federal income taxes;

(9) Claims that have been subordinated in whole or in part to general creditor claims, which shall be given the priority specified in the written instruments that evidence such claims; and

(10) Claims by holders of non-withdrawable accounts, including stock, which shall have priority within this paragraph (a)(10) in accordance with the terms of the written instruments that evidence such claims.

(b) Interest after the date of default on claims under paragraph (a)(6) of this section shall be at a rate or rates adjusted monthly to reflect the average rate for U.S. Treasury bills with maturities of not more than ninety-one (91) days during the preceding three (3) months.

(c) If the rejection or repudiation of an unexpired lease or executory contract by the receiver gives rise to a claim for damages, such claims, if allowed, shall be classified as a claim that has accrued and become unconditionally fixed on or before the date of default, and not as an administrative expense of the receiver.

(d) All unsecured claims of any category or class or priority described in paragraphs (a)(1) through (a)(10) of this section shall be paid in full, or provision made for such payment, before any claims of lesser priority are paid. If there are insufficient funds to pay all claims of a category or class in full, distribution to claimants in such category or class shall be made pro rata. Notwithstanding anything to the contrary herein, the receiver may, at any time, and from time to time, prior to the payment in full of all claims of a category or class with higher priority, make such distributions to claimants in priority classes outlined in paragraphs (a)(1) through (a)(6) of this section as the receiver believes are reasonably necessary to conduct the receivership.

Provided that the receiver determines that adequate funds exist or will be recovered during the receivership to pay in full all claims of any higher priority.

(e) If the association is in mutual form, and a surplus remains after making distribution in full of allowed claims as set forth in paragraphs (a) and (b) of this section, such surplus shall be distributed to the depositors in proportion to their accounts as of the date of default.

[53 FR 25132, July 5, 1988, as amended at 53 FR 30667, Aug. 15, 1988. Redesignated and amended at 54 FR 42801, Oct. 18, 1989]

APPENDIX E

June 15, 1990

Ms. Sandy Parks
Corporate Trust Administration
Security Pacific National Bank
333 South Beaudry Avenue
Los Angeles, California 90017

Subject: *SL-8213, Santa Barbara Savings and Loan Association Santa Barbara, California — In Receivership (5/11/90)*
RE: The Indenture (the "Indenture") dated as of June 1, 1987 between Santa Barbara Savings and Loan Association, Financial Corporation of Santa Barbara and Security Pacific National Bank, Trustee and the 9% convertible subordinated debentures (the "Debentures") due 2012 issued thereunder

Dear Ms. Parks:

On May 10, 1990, by Order No. 90-796, the Director of the Office of Thrift Supervision ("Director") appointed the Resolution Trust Corporation ("RTC") as Receiver for Santa Barbara Savings and Loan Association ("Old Association") effective upon surrender of possession. Thereafter on May 11, 1990 the Receiver took possession of the Old Association and succeeded to all rights, titles, powers and privileges of the Old Association.

By Order No. 97-797, dated May 10, 1990, the Director authorized and directed the issuance of a charter for a new federal savings association, Santa Barbara Federal Savings and Loan Association ("New Federal Association").

By Order No. 90-798, dated May 10, 1990, the Director appointed the RTC as Conservator for the new Federal Association. On May 11, 1990 the New Federal Association purchased substantially all the assets of the Old Association and agreed to assume certain, but not all, liabilities and obligations of the Old Association. The liability of the Old Association on the Indenture and Debentures issued thereunder remain with the Old Association.

The Receiver has found that the Indenture and Debentures issued thereunder are burdensome and that their repudiation will promote the orderly administration of the affairs of the Old Association. Pursuant to the provisions of 12 U.S.C. Section 1821(e)(1) the Receiver may disaffirm or repudiate contracts (including the Indenture and Debentures issued thereunder) of the Old Association. The Receiver hereby repudiates the Indenture and Debentures issued thereunder.

I am enclosing for transmittal to the holders of the Debentures two proof of claim forms (Individual and Corporate). Each holder of a Note must submit the appropriate claim form, fully completed including the social security number or tax identification number. Each proof of claim form should be signed, notarized and submitted together with all supporting documentation to the RTC on or before August 20, 1990 or they shall forever be barred. Pursuant to 12 U.S.C. Section 1821(d)(5)(c)(i), all claims filed late shall be disallowed and such disallowance shall be final. The completed claim form and all supporting documentation should be sent to: Resolution Trust Corporation a

Receiver of Santa Barbara Savings and Loan Association, Attention: Claims Agent, 3906 State Street, Santa Barbara, California 93105.

Very truly yours,

Resolution Trust Corporation,
Receiver for Santa Barbara
Savings & Loan Association

By: /s/
J. Michael Berry as Managing Agent for
Resolution Trust Corporation as
Receiver for Santa Barbara Federal
Savings and Loan Association

APPENDIX F

CHARLES H. MACNAB, JR., CAL. BAR NO. 51077
T. WILLIAM OPDYKE, CAL. BAR NO. 62318
SHEPPARD, MULLIN, RICHTER & HAMPTON
333 South Hope Street, 48th Floor
Los Angeles, CA 90071

Telephone: (213) 620-1780

Attorneys for Plaintiff
SECURITY PACIFIC NATIONAL BANK, as Trustee

United States District Court

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SECURITY PACIFIC NATIONAL BANK as Trustee, *Plaintiff.* *vs.* THE RESOLUTION TRUST CORPORATION, *et al.*, *Defendants.*	CASE NO. 91-1198-IH STATEMENT OF STIPULATED FACTS FOR SUMMARY JUDGMENT Hearing Date: None Set Time: None Set Location: Courtroom 20 Trial Date: None Set

STATEMENT OF STIPULATED FACTS FOR SUMMARY JUDGMENT

It is hereby stipulated by and among Plaintiff, Security Pacific National Bank, as Trustee under the Indenture of Trust dated as of June 1, 1987 relating to certain instruments of Santa Barbara Savings and Loan Association entitled "9% convertible subordinated debentures due 2012"; the Resolution Trust Corporation in its capacity as receiver of Santa Barbara Savings and Loan Association; and the Federal Deposit Insurance Corporation, through their respective counsel of record, that the facts hereinafter stated shall be taken as established, and the documents

attached hereto shall be taken as authentic with respect to any motion brought by any party hereto under Federal Rules of Civil Procedure 56. All of the following stipulations are made subject to an objection on the grounds of relevance being sustained.

1. Santa Barbara Savings and Loan Association ("Santa Barbara") was a state chartered savings and loan association, with its principal place of business in the City of Santa Barbara, County of Santa Barbara, California.

2. Santa Barbara was the wholly owned subsidiary of Financial Corporation of Santa Barbara, a Delaware Corporation ("FSB"), with its principal place of business in the City of Santa Barbara, County of Santa Barbara, California.

3. Santa Barbara Federal Savings & Loan Association was a federal savings association, with its principal place of business in the City of Santa Barbara, County of Santa Barbara, California ("New Federal Association").

4. Security Pacific National Bank ("Trustee") is Trustee on behalf of the holders of certain instruments entitled the "9% Convertible Subordinated Debentures Due 2012" (the "Debentures") issued by Santa Barbara pursuant to that certain Indenture of Trust dated as of June 1, 1987 (the "Indenture").

5. On June 12, 1987 Santa Barbara issued and sold $25 million principal amount of the Deben. es under the terms of the Indenture. The Offering Circular/Prospectus reflects that the proceeds from the sale of Debentures were to be included as part of the regulatory capital of Santa Barbara. The Debentures were fully funded and the proceeds of the issuance of the sale of the Debentures went to Santa Barbara and were included as part of the regulatory capital of Santa Barbara.

6. Authentic copies of the Indenture and form of the Debentures in effect as of the date of the appointment of the Receiver are attached hereto as Exhibits "A" and "B," respectively, and the copies attached hereto are admissible in evidence.

7. An authentic copy of the Offering Circular/Prospectus prepared and issued in conjunction with the Debentures is attached hereto as Exhibit "C" and the copy attached hereto is admissible in evidence.

8. Pursuant to the terms of the Indenture and the Debentures issued thereunder, Santa Barbara and FSB became jointly and severally indebted to Trustee on behalf of the holders of the Debentures in the sum of $25 million.

9. Pursuant to the Indenture and Debentures issued thereunder, Santa Barbara and FSB became obligated to pay interest on the principal amount of the Debentures at the rate of 9% per annum semi-annually on June 1 and December 1 of each year.

10. On January 8, 1990, Santa Barbara and FSB completed an equity for debt exchange transaction which resulted in an exchange of $16,600,000 principal amount of the Debentures for shares of FSB common stock. After the exchange, $8,400,000 of the Debentures remained outstanding. An authentic copy of the Offering Circular Prospectus (Supplement No. 2) is attached hereto as Exhibit D and the copy attached is admissible in evidence.

11. The Trustee was notified that on April 27, 1990 by Order Nos. 90-672 and 90-673, the Resolution Trust Corporation ("RTC"), pursuant to the resolutions adopted by the Office of Thrift Supervision (the "OTS"), was appointed as "Conservator" of Santa Barbara.

12. The Trustee was notified that on May 10, 1990 by Order No. 90-796 that the RTC, pursuant to the resolutions adopted by the OTS, was appointed as "Receiver" of Santa Barbara.

13. Authentic copies of Orders Nos. 90-672, 90-673 and 90-796 are attached hereto, collectively marked Exhibits "E", "F" and "G" and the copies attached hereto are admissible in evidence.

14. On May 10, 1990, by Order No. 90-797, the OTS authorized and directed the issuance of a charter for New Federal Association. On May 10, 1990, by Order No. 90-798 the OTS appointed RTC as "Conservator" of New Federal Association.

15. Authentic copies of Orders No. 90-797 and 90-798 are attached hereto, marked Exhibit "H" and "I" and the copies attached hereto are admissible in evidence.

16. On May 11, 1990, the RTC as receiver of Santa Barbara, and the RTC as conservator of New Federal entered into a Purchase and Assumption Agreement, dated May 11, 1990, pursuant to which New Federal Association purchased certain assets of Santa Barbara and assumed certain but not all, liabilities and obligations of Santa Barbara. The Indenture and the Debentures were not assumed by New Federal Association.

17. An authentic copy of the Purchase and Assumption Agreement, dated May 11, 1990, is attached hereto, marked Exhibit "J" and the copy attached is admissible in evidence.

18. By letter dated June 15, 1990 the RTC as receiver of Santa Barbara informed the Trustee that the liability of Santa Barbara under the Indenture and Debentures issued thereunder was with Santa Barbara, that the RTC had found the Indenture and Debentures to be burdensome, and therefore, pursuant to 12 U.S.C. § 1821(e)(1), the RTC, as receiver of Santa Barbara, repudiated both the Indenture and the Debentures issued thereunder.

19. An authentic copy of the letter dated June 15, 1990 is attached hereto marked Exhibit "K" and the copy attached hereto is admissible in evidence.

20. On August 17, 1990 the Trustee filed with the RTC as Receiver of Santa Barbara, its Proof of Claim. On August 17, 1990 the RTC acknowledged in writing that it accepted the Trustee's Proof of Claim for filing.

21. Authentic copies of the Trustee's Proof of Claim and the RTC's acknowledgment of Proof of Claim are attached hereto, collectively marked as Exhibits "L" and "M" and the copies attached hereto are admissible in evidence.

22. The RTC did not determine whether to allow or disallow the Trustee's claim within 180 days of August 17, 1990 and has never notified the Trustee of any such determination.

23. An actual justiciable controversy has arisen and now exists between the Trustee and the RTC as Receiver of Santa Barbara concerning whether the repudiation of the Indenture and Debentures by the RTC as Receiver of Santa Barbara has created in the Trustee a statutory claim for damages pursuant to 12 U.S.C. § 1821(e)(3) which is of equal priority with claims for withdrawable accounts, including those of the Defendants as subrogee or transferee, and all other claims of equal priority which have accrued and become unconditionally fixed as provided in regulations of the RTC at 12 C.F.R. § 389.11(a)(6). The FDIC denies the existence of any controversy concerning the FDIC.

24. The RTC as receiver of Santa Barbara has not determined, at this time, whether the liquidation of the assets of Santa Barbara will enable the RTC as receiver to pay all, or any portion of, any claim, of any priority, in the Santa Barbara receivership estate.

25. The Trustee, the RTC as Receiver of Santa Barbara, and the FDIC stipulate that the determination of the maximum liability of the RTC and the determination of the value of the assets of and claims against the receivership estate, are both speculative and uncertain at this time, and, in any event, are irrelevant and immaterial to the resolution of the actual and justiciable controversy as set forth in paragraph 23 above.

Dated: December 27, 1991

CHARLES H. MACNAB, JR.
ROBERT S. GERBER
SHEPPARD, MULLIN, RICHTER &
HAMPTON

By: /s/
CHARLES H. MACNAB, JR.
Attorneys for Plaintiff
SECURITY PACIFIC NATIONAL BANK

Dated: December 27, 1991

THOMAS A. SCHULTZ
CHARLES L. COPE II
DANIEL F. ROSS

By: /s/
DANIEL F. ROSS
Attorneys for Defendant
FEDERAL DEPOSIT INSURANCE
CORPORATION

Dated: December 24, 1991

ALBERT TUMPSON
KENDERTON S. LYNCH
DAVID J. MYERS
TARKINGTON, O'CONNOR & O'NEILL

By: /s/
KENDERTON S. LYNCH
Attorneys for Defendant
RESOLUTION TRUST CORPORATION
As Receiver for SANTA BARBARA SAVINGS
AND LOAN ASSOCIATION